Supreme Court

United States of America, Appellant,

vs.

William J. Hinke, Appellee.

Brief and Argument for Appellee.

WALTER M. BUCKFORD,
GEORGE F. SUTTON,
Counsel for Appellee.

Butler Printing Co. Printers, Butler.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

UNITED STATES OF AMERICA, APPELLANT,
v.
WILLIAM A. CLARK, APPELLEE.
No. 359

BRIEF AND ARGUMENT FOR APPELLEE.

WALTER M. BICKFORD,
GEORGE F. SHELTON,
Counsel for Appellee.

APPEAL FROM THE DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AFFIRMING THE DECREE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

STATEMENT OF FACTS.

This cause comes before this court on appeal from the decree of the United States Circuit Court of Appeals for

the Ninth Circuit (Rec. Vol. of Pro. in U. S. Circuit Court of Appeals, p. 11), affirming the decree of the United States Circuit Court for the District of Montana, dismissing the bill of the United States, the complainant below and appellant here. (Rec. Vol. Pl. & Ind., p. 58.)

The facts as they appear of record in this case are as follows:

The United States filed its bill against William A. Clark, the defendant and appellee, on the 24th day of June, 1901, in said court, wherein it alleged in substance:

That on January 1, 1898, complainant was the owner of certain lands in the state and district of Montana therein described by Government subdivisions, and embracing in the aggregate, approximately, 11,480 acres, the total value of which is alleged to be $10,000 and upwards. That said lands were of such character as to be subject to entry as timber lands under the Act of Congress approved June 3, 1878, as amended by Act approved August 4, 1892. That as a condition precedent to the purchase of said lands the applicant therefor was required by the terms of said Act to file a written statement in duplicate, on oath, that he did not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; that he had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title he might acquire from the Government should inure in whole or in part

to the benefit of any person except himself. That subsequent to January 1, 1898, one R. M. Cobban of Missoula, Montana, claiming to act for the use and benefit of the defendant, set about the business of procuring the title and possession of the lands described in said bill from complainant. That in pursuance of such avowed purpose Cobban entered into a written contract with one C. L. Griswold of date May 22, 1899, for the purpose in said contract stated of obtaining lands from complainant under said Acts of Congress.

That said purpose could only be carried out and accomplished by procuring false and fraudulent statements in writing and under oath, and false and fraudulent proofs to be reduced to writing, sworn to and subscribed by parties entering said lands in parcels not exceeding 160 acres each.

That Cobban associated one John B. Catlin with himself, and Cobban, Griswold and Catlin, through themselves and others, examined the lands, procured persons for hire to enter said lands, paying their expenses and those of their witnesses, and paying the government price therefore at the proper United States Land Office.

Said bill then proceeds as follows:

"That after such sworn statements were made by the persons so employed and the final proofs made respectively and the money paid for witnesses' expenses, entrymens' and entrywomens' expenses, land office fees and the price required by said Acts of Congress so cited.

"And the several entrymen and entrywomen who had thus acted were paid compensation respectively, all directly or indirectly by said R. M. Cobban, who took deeds to himself for said lands from the several parties who entered the several parcels respectively; and that said Cobban thereafter conveyed the same to said defendant William A. Clark; that the various parties so made use of as entrymen and entrywomen, and the parcels of land entered in the names and through the acts of each are hereinafter set forth in detail, person by person, and parcel by parcel, and are as follows:"

There are then set forth in said bill, in separate paragraphs, certain charges as to the alleged fraudulent entries by each of the persons named in the twenty-third assignment of error filed herein, to-wit:

Charles Cloutier, John Gillies, Martha M. J. Doney, Edward D. Doney, Thomas Pelky, B. Frank Chattin, Albert F. Muchmore, Guy W. Muchmore, Oliver E. Muchmore, Elizabeth A. Muchmore, John B. Catlin, Belle Bryan Gillies, Leonard Barrott, Edgar Lehman, Lelia T. Bryan, May Hawthorne, Harriet Watson, Marion B. Watson, Charles H. Moss, Katie Watson, Cora Dodd, Dick E. Watson, Charles B. Sperry, Thomas H. McConnell, Hiram Dodd, Harrison Dodd, Matilda Dodd, Lizzie Dodd, Vital Cyr, Levi B. Cyr, Mary J. Ehle, Jacob F. Jamison, Albert Jamison, Joshua C. Gilman, George P. Jameson, Sarah Yarger, Emma Dildine, George Dildine, Matilda Eddy, Thomas Roll, Abraham J. Jamison, James W. Wheaton, Mary Eddy, Herbert Eddy, Daisy Chattin, John L.

Deering, John Saleen, Charles C. Snyder, Matthew P. Dunham, Frank P. Arey, Dan McGillis, Elvira M. Hardy, John H. Hardy, Effie M. Killburn, Arnold Michels, Clara Belle Michels, William J. Eddy, Lavinia J. Gilman, Percy M. Jamison, James Mise, Laura Roll, Charles H. Jennison, Calvin Yarger, Zora Jamison, Jennie Mise, John G. Hundryx, Martha E. Wright, Lizzie T. Catlin, Oscar Muckenleinn, Stephen Tepper, John B. Reeve, Robert Starkie, Albert Ehle, Eliza A. Reeve, Mary A. Starkie, John Murtaugh, Harriet Bryan and Eveline Jamison.

The charges in said bill contained concerning each of said entrymen and entrywomen, are in practically the same terms and language, and the allegations relative to any one of the entrymen or entrywomen will serve for all, and for that purpose the charges as to the entry of Harriet Bryan may be taken as typical of the charges against each one of the entrymen and entrywomen in said bill contained.

As to the entry of Harriet Bryan, it is set forth in said bill that Harriet Bryan filed with the proper land office at Missoula, Montana, a sworn statement, serial number 259, and subsequently on September 4, 1899, did make and file final proofs, and on said date a Receiver's receipt was issued in her name for the south half of the southeast quarter, and the south half of the southwest quarter, of section 26, township 15 north, range 15 west, which receipt was afterwards delivered or sent to R. M. Cobban by the officials of said land office.

That no purchase money paid for said land at said office was *furnished* by said Harriet Bryan. On the contrary, the same, as well as all moneys paid for the land office fees in connection with said entry, as well as the personal expenses of said Harriet Bryan and witnesses, were furnished and paid directly or through agents by R. M. Cobban in pursuance of an agreement with said Harriet Bryan that such lands should be conveyed to him (said Cobban) or his order as soon as possible after such final proofs were made, the fees upon such entries and the purchase money paid and the receiver's final receipt for said land issued.

That said proofs so made were false and fraudulent in that "said Harriet Bryan did apply to purchase the said described land on speculation, and did not in good faith purchase the same to appropriate them to her own exclusive use and benefit, and in that she had made a contract or agreement with another person by which the title she might acquire to said land from the Government of the United States should inure wholly to the benefit of another person except herself."

That on September 16, 1899, said Harriet Bryan deeded said lands to said Cobban; that the patent of the United States therefor was not issued to said Harriet Bryan for a long time thereafter.

It is further alleged and charged that the entries and conveyances were made by and through the means adopted by said Cobban, and said deeds placed

on record. That the patents procured from complainant for said lands were placed on record in the proper counties. That said patents and deeds to said Cobban were delivered to A. H. Wethey, alleged to be at said time secretary of defendant, "said deeds and patents being so procured for defendant's use and benefit." That said lands have been conveyed to said defendant, who now claims to own the same.

That said defendant William A. Clark well knew in a general way, if not in detail, at the time the said conveyances of all said lands were made to him by said Cobban, the facts hereinbefore stated, and well knew and had good cause to know that the said lands had been entered in violation of the laws of Congress under which said entries were made, and that the said several parties had entered the same for hire and upon speculation and for the purpose of enabling him, the said defendant, to procure title to the same by evasion and violation of said laws of Congress.

The prayer of the bill is that said patents so issued as aforesaid be declared void and ordered cancelled; that complainant be declared to be the owner in fee of said lands and the owner of all timber and logs cut thereon, or removed therefrom, and of all stone quarried or removed therefrom; that the title of defendant be declared void and that he release and convey the same to complainant; for an accounting of the value of the timber and stone cut and quarried or removed from said lands; for an injunction restraining defendant from cutting

or removing any timber or stone or lumber from said lands pending the suit; and for an injunction restraining defendant from deeding, selling or incumbering, or disposing of said lands pending the suit. (Rec. Vol. Pl. & Ind. pp. 3 to 17.)

To said bill of complaint the defendant, on September 28, 1901, and within the time allowed by the rules and orders of said Circuit Court, duly filed his amended answer, wherein is admitted that the complainant was the owner of the lands described in the said bill on the 1st day of January, 1898, except one particular parcel therein described as the northeast quarter of the northeast quarter, and the south half of the northeast quarter, of section 17, township 21 north, range 10 east, of which defendant averred that he had no knowledge or information, and as to which he disclaimed any right or interest.

The residue of the land described in said bill is admitted to be of such character that it was subject to entry under the timber laws of the United States in the manner and under the conditions set forth in said bill, and particularly under an Act of Congress entitled, "An Act for the sale of Timber Lands in the States of California, Oregon, Nevada and Washington Territory," approved June 3, 1878, and the further act of Congress amendatory thereto entitled, "An Act to Authorize the Entry of Lands Chiefly Valuable for Building Stone Under the Placer Mining Law," approved August 4, 1892, and particularly admitting the allegation of said

bill as to the written statement under oath required to be made by applicant therefor.

It is expressly denied that at a day or date subsequent to January 1, 1898, or at any other time, R. M. Cobban claimed or pretended to act for the use or benefit of the defendant, or that said Cobban ever did so act or claim to act for defendant, in the business of procuring title to or possession of lands either from the complainant or from any other person whatsoever, or that in pusuance of any agreement or contract by or between said Cobban and defendant, any lands whatever were bought or procured or purchased except as in said answer set forth. That with reference to the allegations of said bill in relation to the contracts and agreements between said R. M. Cobban and C. L. Griswold defendant avers, on information and belief, that said parties did enter into a contract or agreement looking to the acquisition by said Cobban of the title to the lands belonging to the complainant, but defendant denies, on information and belief, that said contract or agreement could be carried out or accomplished only by procuring false or fraudulent statements in writing, or under oath, or otherwise, or false or fraudulent proof: and defendant further avers that his knowledge of said contract or agreement was only obtained long after he had acquired title to all of said lands, and that at the time he acquired title to said lands and at the time the same were conveyed to him by said Cobban, he had no knowledge or notice of any such contract or agreement whatever.

Defendant further denies, on information and belief, that in obtaining title to any of the land described in complainant's bill of complaint there was ever presented any false or fraudulent proof in any manner either in writing or otherwise by the parties who entered said land. Defendant further disclaims any knowledge or information as to whether John B. Catlin was ever associated with said Cobban, and denies, on information and belief, that Cobban, Griswold and Catlin, through themselves or others, or in any manner, examined land or procured the same to be examined, or paid expenses of any person or persons, or of any witness or witnesses, and denies expressly that they, or either of them, paid the price required to be paid at the proper land office office of the United States.

Defendant further denies, on information and belief, that the several entrymen or entrywomen who made the entries of the land set forth in the bill of complaint were paid compensation, either directly or indirectly, by said Cobban; and defendant avers the fact to be that the said Cobban purchased said land in the usual course of business, became the owner thereof in fee, and thereafter, in the usual course of business, and after said Cobban had presented to defendant an abstract of title duly certified, and after said abstract of title had been presented to defendant's counsel and the same had been favorably reported on by said counsel, and then only did defendant purchase or agree to purchase said land, or any part or parcel thereof.

Defendant further avers that at the time the lands in said answer set forth were purchased by him final proof had been made thereon by each of said persons to whom a final receipt had been given, and each and all of the persons named in the bill of complaint as being the entrymen and entrywomen of said land had made final proof before the Register and Receiver of the said land office in which entry was made, had received their final receipts for the purchase price thereof, and that defendant had no knowledge as to who the entrymen or entrywomen were, but relied on the good faith of the various persons who had made such land entries, and relying upon the good faith, watchfulness and care of the officers of the United States Land Office, and upon the final receipts issued by the Register and Receiver of the respective land offices, and relying upon the abstract of title, the advice of counsel and the deed showing the conveyances from the original entrymen to said R. M. Cobban, the defendant became a bona fide purchaser of the said lands particularly described in said amended answer for a valuable consideration and without notice or knowledge of any fraud upon the part of anybody or any person, directly or indirectly, connected with said lands, and thereupon became and is the owner thereof.

Defendant then sets forth specifically, by Government subdivisions, the land purchased by him from said R. M. Cobban at different times, which said land includes all of the land set forth and described in the bill of complaint, except the particular parcel hereinbefore men-

tioned and described, as to which defendant disclaimed any right, title or interest, and particularly also excepting certain described lands as to which the defendant avers that he did not purchase the land, but did purchase from the owners thereof the timber standing thereon, and which said timber was purchased by said defendant from said Cobban, who was then and there the owner of said land, in good faith for a valuable consideration, and without any notice whatever of any fraud.

Defendant further expressly denies that he knew in any way whatever, general or otherwise, any facts mentioned in the bill of complaint, or otherwise, to the effect that the land entries in said bill of complaint mentioned were made in any other than the usual, legitimate and lawful manner of such entries. He further denies that he at any time knew that all or any of said land entries had not been made in a legal, lawful or legitimate manner. Denies upon information and belief that said lands, or any of said lands, had been entered in violation of any law of Congress, or that any of said parties had or did in any manner enter said lands, or any of them, for hire or upon speculation, or for the purpose of enabling defendant to procure title thereto by evasion. Denies that defendant knew, or had cause to know such, or that any act or thing done in and about the premises had been done in violation of the laws of Congress, or that said defendant knew, or had cause to know, that said lands, or any of them, had been entered in vio-

lation of the laws of Congress, and specifically denies each and every charge and allegation in the bill contained wherein the said defendant is charged with either the knowledge or the commission of any act of fraud, covin or evasion, or of any violation of any law of the Congress of the United States.

Defendant further sets forth specifically, as affirmative matter bearing upon the questions at issue, that he is a citizen of the United States, over the age of twenty-one, and a resident of the state of Montana. That on certain days and dates between the 29th day of July, 1899, and the 15th day of June, 1900, the defendant purchased from one R. M. Cobban and his wife, Alice M. Cobban, certain tracts of land particularly mentioned and described in said answer, and which tracts of land include all of the tracts of land mentioned and described in complainant's bill of complaint, except those hereinbefore expressly and in said answer excepted, and as to which defendant disclaims title thereto. That at the time said Cobban sold to said defendant said described lands said Cobban claimed to defendant to own the same; that he did own and was in possession of the same at said time, and exhibited to defendant a good and sufficient abstract of title to said lands, showing that the said Cobban did own the same. That defendant submitted said abstract of title to his attorneys and was by them advised the same was correct; that the title to said land was in said Cobban, and thereupon said defendant, relying upon the representations of said Cob-

ban and upon the said abstract of title, and upon the advice of his said attorneys, purchased said land, paying therefor a good and valuable consideration, being the full value therefor according to the market price of such lands in that vicinity, which said payment was in lawful money of the United States, and which said sum of money was accepted by said Cobban as payment in full for said lands. That defendant was and is an innocent purchaser of said lands in good faith, for a valuable consideration, at the time of said purchase and the payment therefor; and at the said time he had no information or knowledge of any fact or facts which would lead him to believe that the title to said land was in question, and that he had no notice either actual or constructive of any fraud on the part of his grantor, or of any other person whomsoever.

That the lands so purchased by the defendant from said Cobban and described in said answer, and which were deeded as aforesaid to defendant by R. M. Cobban and Alice M. Cobban, his wife, comprise all of the lands mentioned and described in said bill of complaint concerning which it is sought to obtain a forfeiture of the title, except the particular parcel as to which said defendant disclaims any right, title or interest as above set forth, and thereupon defendant prays that he be hence dismissed with his costs.

And thereafter, and on the 30th day of August, 1901, the United States duly filed its general replication (Rec. Vol. Pl. & Ind. pp. 56-67), and issue thereupon was

joined between the complainant, United States of America, and the defendant, William A. Clark.

And thereafter, the evidence in the case having been taken, the case was submitted to the court for decision and adjudication upon the proofs, and on the 7th day day of November, 1903, the court duly filed and entered its decree dismissing complainant's bill. (Rec. Vol. Pl. & Ind. p. 58.) The court also at said time filed its opinion in writing. (Rec. Vol. Pl. & Ind. pp. 59 to 68.)

Thereafter an appeal was duly taken to the Circuit Court of Appeals for the Ninth Circuit, and thereafter, on the 22nd day of May, 1905, the said Circuit Court of Appeals handed down its opinion affirming the said decree of the said United States Circuit Court, and a decree was duly entered in said Circuit Court of Appeals in accordance with said opinion. (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., pp. 1-11.)

Thereafter the appellant filed a petition for appeal (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., p. 12), assignments of error (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., pp. 12-19, inclusive), and, on June 28, 1905, an order was made allowing the appeal to the Supreme Court of the United States (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., p. 19). On the 26th day of June, 1905, a citation was issued (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., p. 20). Acceptance of service of said citation was acknowledged on the 3rd day of July, 1905 (Rec. Vol. of Pro. in Cir. Ct. of Apps., p. 20); and the

citation and acknowledgment of service filed July 6, 1905 (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., p 20).

FACTS ESTABLISHED BY THE EVIDENCE.

The testimony taken in the case under the issues raised by the pleadings, and found in the record, establishes the following state of facts:

In the years 1899 and 1900 entries under the Timber and Stone Act of Congress were made by various persons upon the public lands subject to entry under that act in Missoula and Deer Lodge Counties in the State of Montana. The lands described in the bill of complaint were entered at the United States Land Offices at Missoula and Helena in said State during said years. The entrymen and entrywomen in each instance had the requisite qualifications to make said entries. Each and all of them personally went upon the land. The written statement in duplicate, verified by the oath of each applicant, required by act of Congress, was duly filed. The requisite notices were given and published. The final proof according to the requirements of the law was duly made by the requisite number of witnesses, the purchase money paid into the land office, the final receipt and certificate duly given to the entrymen and entrywomen, and thereafter patent from the United States for the land entered by each entryman or entrywoman was duly issued and delivered to the persons entitled thereto. In

each and every instance there was no circumstance or detail that did not appear upon the records to be in good faith and in full compliance with the requirements of law. After the issuance of the final receipt by the Receiver of the land office the title of the entrymen and entrywomen was purchased by one R. M. Cobban. The purchase price agreed upon was paid by him, a warranty deed executed to him by the entrymen and that deed placed on record in the office of the County Recorder of the proper county. Thereafter application was made by Cobban to defendant to sell him the lands so conveyed to said Cobban. The proposition was entertained by the defendant, and the reason therefor was that the defendant had a contract at that time with a branch of the Amalgamated Copper Company to furnish certain timbers and lumber, which contract was of limited duration; that the Big Blackfoot Milling Company, a corporation, through which the Amalgamated Copper Company was at that time engaged in operating its lumber business, had by means of forest reserve scrip, as it was called, purchases from the Northern Pacific Railway Company, and purchases from entrymen under the Timber and Stone Act, secured a large amount of timber in the state of Montana. The defendant, for the purpose of protecting his own interests, and to avoid the consequences which might result upon the termination of his contract with the Amalgamated Copper Company found it necessary to purchase timber for use in his mines and in the building operations in which he was engaged.

At the time that Cobban proposed to sell timber lands to defendant, he stated that he owned the lands. Abstracts of title from reputable abstracters in the counties in which the lands lay were presented. Deeds from Cobban and his wife to defendant were also presented for examination. The price asked by said Cobban for the land was, in the first instance, $1.50 per 1,000 feet of standing timber. This was considered excessive by the defendant, and it was finally agreed that the defendant should purchase from said Cobban certain timber lands to be examined and estimated by the estimators of the defendant at the price of $1.25 per 1,000 feet of standing timber, the title to be subject to approval of the attorney for the defendant. The abstracts of title were thereupon submitted to Judge Bickford, the attorney for the defendant, who examined them, approved some, and rejected others. The deeds were carefully examined and approved by said attorney, a report was made by him to the general manager of the defendant, Mr. A. H. Wethey, and thereupon, on the 29th day of July, 1899, the deed for a portion of the land in the bill of complaint described was delivered to said manager of the defendant, and the purchase price therefor paid. This transaction was separate and distinct in itself. Thereafter, in September, additional lands were sold to the defendant by said Cobban upon the same terms as to the price and title and under the same circumstances, and this transaction was complete and finished by itself. Thereafter, said Cobban made applica-

tion to sell a further block of land. Defendant declined to purchase more land, stating that he had all the timber that he then needed. He, however, after some importunity on the part of Cobban, agreed to loan Cobban certain moneys, taking as security a deed for the timber lands (but the title to which should be held as security for the loan), the loan not to exceed 75 cents for each 1,000 feet of standing timber as estimated by the estimators upon the ground. The title to the ground was to be approved by the attorney for the defendant in the same manner as the title to the ground covered by the previous purchases, Cobban then and there representing that he was the owner of the ground and furnishing abstracts of title and deeds as in the former transactions. It was further agreed that the defendant should have an option to purchase if he saw fit within four months, by paying an additional sum of 50 cents per 1,000 feet of standing timber, being in addition to the 75 cents advanced. The title to the ground was approved by the attorney for the defendant, the form of the deed was also approved; the deed was delivered to the manager of the defendant, and subsequently, and within the four months, Cobban applied to the general manager of the defendant to take up the option, and in consideration that Cobban accept a reduction of five per cent. of the purchase price agreed upon that option was taken up and the deeds conveying the absolute title to the ground delivered by Cobban and wife to defen-

dant, and the title of the defendant thereupon became absolute.

In all of the transactions by which this timber land was sold and ultimately conveyed to defendant the title to each and every piece and parcel thereof was evidenced by a final receipt from the receiver of the land office issued to the entryman, and a warranty deed from the entryman to Cobban duly made, executed, delivered and recorded. All mortgages, liens and taxes had been paid and satisfied, and the abstracts of title showed good and indefeasible title to the ground in Cobban. The conveyances from Cobban and wife (all conveyances being with full covenants of warranty) transferred the title to defendant. The abstracts of title were approved by the attorney for the defendant, and, so far as appears, there was no flaw or defect of any kind whatever in the title—nothing which could raise a suspicion that the title to the ground was not perfect; no fact or circumstance to put a purchaser upon inquiry as to any defect in the title,—and the Government of the United States subsequently issued and delivered its patent to the land in question, thereby conveying a perfect title to the entryman and his successors in interest. The defendant had no notice whatever, actual or constructive, that there was any question as to the regularity of the proceedings by which title to these lands had been acquired from the government. He paid the full market value for the timber and for the land. The price named in the deed from Cobban to defendant is the actual price paid in

cash for these lands. It is conclusively established by all of the evidence in the case, that the defendant bought the lands in question in good faith, paid the full market value therefor, and had no notice whatever that there was any question as to title to the land or the manner in which the same had been acquired from the United States.

This suit brought by the government to set aside the patents, to declare the title still in the United States, and to compel a reconveyance from the defendant to the United States, is founded upon allegations of fraud and perjury on the part of the entrymen and entrywomen who entered the lands, and upon the allegation that Cobban acted as the agent and employe of the defendant in securing title from the Government; that the entrymen and entrywomen entered the lands for hire and not in good faith, and that in so doing they were acting as the employes of the defendant, hired to that end by his alleged agent Cobban. *To sustain the allegations of the bill in this respect not one word of testimony has been introduced.* The defendant expressly says in his testimony that Cobban was not his agent or representative in any sense of the word and never had been; that he knew nothing of the manner in which the title to the lands was secured from the Government of the United States; that Cobban, after he had purchased the lands from the entrymen and entrywomen and had conveyances to show for it, after the issuance of the final receipts from the land office, sold the lands to

defendant and he purchased them in good faith for value as any other purchaser of real estate; that Cobban did not in any way act as his agent or representative, nor did he in any way furnish money for Cobban to obtain title to the lands. The defendant is corroborated in this by the testimony of Mr. Wethey, his manager, and by the testimony of other witnesses in the case. Mr. Cobban also states in his testimony that he was not the agent of the defendant or his representative, and never had been; that he obtained the money to purchase the land from the various entrymen and entrywomen by borrowing the same in many instances from various banks in Missoula and Butte, giving his notes therefor, and in this he is corroborated by the officers of the various banks that loaned him the money, and the notes, as cancelled, are also in evidence in the case.

We may, therefore, say that the evidence in the case clearly establishes that Cobban purchased the land from the entrymen and entrywomen individually, upon his own responsibility and for his own benefit and with his own money; that the defendant had nothing whatever to do therewith, and that the defendant purchased the land from Cobban individually and for his own benefit as a separate and distinct transaction.

The allegation in the bill of fraud on the part of the entrymen and entrywomen in the entries and of Cobban's participation in the fraud is without support in the evidence. To support the allegations of fraud the case of the government depends entirely upon the tes-

timony of one person—Chauncey L. Griswold. There is in evidence a copy of a contract entered into on the 22nd day of May, 1899, between Cobban and Griswold, by the terms of which Griswold was to examine timber and timber land and use his best endeavors to purchase the same for Cobban. Griswold testifies that he thereupon visited the vicinity in which the lands in controversy in this suit were situated; that he caused it to be generally known that all people who desired to enter lands could secure $100 for each claim entered, and that he, as the agent of Cobban, would pay for the entry all expenses, including the expenses of the witnesses, and upon final proof $100 in advance to the entrymen and entrywomen, and that these entrymen and entrywomen agreed to make the entries for the benefit of said Cobban.

This testimony on the part of Griswold is expressly contradicted by each and every entryman and entrywoman that entered lands. They each and all testify that they either furnished the money themselves to enter the lands and for the expenses, or that they borrowed the same. Some of the money was borrowed by them from the firm of Jakways & Faust, general merchants in that vicinity, who did also a species of banking business for their customers, or they borrowed the money from Mr. Cobban, and that they did not enter the land on speculation or for sale. That they did not enter into any contract or agreement directly or indirectly to sell the same, and that there was no contract or agreement by which they were bound to sell said land upon final

proof, and further, that the money which they obtained to prove up was a loan which they were bound to repay with interest. It is further in evidence that Cobban instructed Griswold and all persons in his employ to at no time make any contract or agreement for the purchase of the land, and to carefully avoid in every way any contract or promise or understanding which would be in violation of the laws of the United States relative to entry of timber lands or which might be construed to be in violation thereof. In some instances the land was purchased by Cobban and in other instances, only the timber on the land was purchased, and every purchase is shown to have been made after final proof and issue of final receipt.

The testimony of Griswold is unworthy of belief. It is shown by the uncontradicted testimony of a large number of witnesses that his reputation for truth and veracity and honesty in the community in which he lived has been bad; in fact, of the very worst; that he had brought a suit against Cobban to force a settlement of claims that he made for services rendered to Cobban in the location of timber lands; that that suit was settled, and that he thereupon signed an affidavit (defendant's exhibit E) in which he deposed that he had no knowledge of any acts done, or authorized, by said R. M. Cobban in the procurement of title to the lands taken up by parties under the Timber and Stone Act of Congress which were in violation of said act or in violation of any law of the United States relative to the acquiring

of title to the lands, and that the instructions of said Cobban to this affiant while in his employ were always to the effect that no contracts for the purchase of timber and stone claims should in any case be made prior to final proof thereon in the United States Land Office.

This affidavit was made in the presence of some five reputable witnesses. Griswold testifies that he did not read the affidavit over. Each and all of the witnesses state that he did read it over, commented on it and stated that it was true, and that the statements which he had previously made in an affidavit given to Zevely, a Government agent, were false.

It is further established that Griswold stated that he had made a report to the Government inspector or agent (Zevely) concerning illegal entries under the Timber and Stone Act, and that he was going to put Cobban and several others in the penitentiary unless they settled with him upon such terms as he wanted. That his counsel, one Draffen, was a personal friend of Zevely and would force a settlement. It further appears that Draffen stated to T. C. Marshall and to his partner, Mr. Stiff, that he was going to make a report of Cobban's connection with illegal entries of public land for the purpose of forcing a settlement in the case of Griswold against Cobban. It is further in evidence that Griswold stated that the indictment against him had been nollied by the Government of the United States in consideration of the fact that he was to use his best endeavors to secure a judgment for the United States in this case; that he

was to have a permanent position under the Government as a Government employe if it was successful in the case. The counsel for the Government at the hearing stated that the Government itself was defending Griswold and representing him as his protector in the prosecution for perjury against Griswold.

It further appears that Griswold stated that he was receiving pay in addition to his witness fees from the representatives of the Government in this suit. The evidence also clearly establishes and Griswold admitted upon the stand that he had committed perjury in numerous instances in timber and stone entries, and that he would do so again if necessary; that he had knowingly sworn falsely upon numerous occasions and did so for a consideration of $25. The evidence is also uncontradicted and clear that Griswold was not only a perjurer, but that he was also a thief and had committed petty larceny upon numerous occasions; that he was a blackmailer and had secured $1,000 as "hush money" in connection with some charges that he purposed making against the Anaconda Copper Mining Company, having threatened to disclose certain transactions of that company and had been paid $1,000 in consideration of keeping the matter quiet. He was also shown to have been the frequenter of low and vile resorts, the associate of criminal and disreputable companions, to be without credit or standing or credibility among the respectable people of the community in which he lived, and to have for many years borne a bad reputation.

This man was put forward by the Government as their main witness in support of the allegations of its bill.

There are only three other witnesses whose testimony is at all favorable to the Government. These are L. A. Wells, his wife Lizzie A. Wells, and M. R. Stairs.

The testimony of Wells is to the effect that he had a certain conversation with Cobban in which Cobban admitted that he had a large number of applicants to enter timber lands under an agreement in effect to sell them to him after entry, and that he knew that this was contrary to law and in violation of the statute of the United States, and that the entrymen were committing perjury in so doing.

The testimony of Mrs. Wells is to the effect that she saw a telegram sent by Cobban to Griswold warning him against advancing money to Wells or his wife in proving up upon their claim without a specific understanding that they were to convey to him immediately upon the issuance of final receipt.

The testimony of M. R. Stairs is to the effect that he had certain conversations with various entrymen and entrywomen in which they admitted that they had entered the lands for Cobban upon a specific agreement to convey to him immediately upon the issuance of the final receipt.

The evidence of Wells is expressly contradicted by Cobban. The alleged telegram is not produced, nor any copy thereof. Cobban denies the sending of any such

telegram, or that any such telegram of that kind or character, or any telegram concerning Wells or his wife, or their entry, was ever sent by him at any time. The testimony of Wells and his wife is discredited further by the fact, clearly established, that they borrowed the money from the Big Blackfoot Milling Company with which to make their entry; that they gave a mortgage to the Big Blackfoot Milling Company, and that one of the objections made by counsel who examined the title prior to the purchase by the defendant was that this mortgage was unsatisfied and outstanding of record against the property at the time of their proposed sale. It is further in evidence that Wells himself was a man whose reputation for truth, veracity and honesty in the community in which he lived was bad. He was impeached by some eight or nine reputable citizens and residents of the vicinity in which he lived. In fact, the testimony concerning Wells' reputation for truth and veracity and honesty is grotesque, in that it appears from the uncontradicted evidence that he was so notorious for his lack of veracity that he was called by some uncommon name indicating that he was an unconscionable liar. A license had been posted by some joker upon a public bridge authorizing Wells to do the lying for all of the people in a given vicinity, which license remained for some little time, according to the testimony of witnesses, and was read by a large number of people. The witnesses all declared that he could not apparently speak the truth, and was utterly without credibility in

that vicinity. So overwhelming is this testimony that upon reading it the reader is convinced that statements by Wells are entitled to no credence. His wife, although not impeached by the direct testimony of witnesses, is shown to be a woman of bad character, and her statement is uncorroborated and unsupported by any one except Griswold, and directly impeached by the testimony of J. H. T. Ryman, who expressly contradicts her testimony in a material respect.

The testimony of Stairs is contradicted by all of the entrymen and entrywomen with whom he said that he had conversed. It is further shown that his reputation for truth and veracity is bad, by a large number of witnesses who are acquainted with that reputation. It further appears that he kept a "road house" in a remote section of the county in which crimes of a serious nature had been committed, and that his testimony, even if uncontradicted, was unworthy of belief. The testimony, however, of Stairs was entirely hearsay and not competent testimony to be considered.

Upon testimony of this character the Government has relied, and there is no substantive, credible proof to establish a single fact tending to support the allegations of the bill that this land was entered fraudulently or in violation of the law of the United States.

It appears that the only witnesses upon whom the Government relies at all are persons whose reputation for truth and veracity and honesty is bad in the community in which they live, and whose word is not taken

as tending to establish any fact by the people with whom they are acquainted, and that these witnesses also are of bad character and engaged in occupations of such nature as to deprive them of faith and credibility in their community.

We, therefore, contend that the Government has failed to establish any allegation of its bill entitling it to the relief sought, or any part thereof, and that, in general, from this review of the evidence, the decree of the Circuit Court of Appeals was right and should in all respects be affirmed.

ARGUMENT.

The contention of the Government, as specified in the assignments of error filed herein, presents three general subjects for discussion:

FIRST. That the defense of bona fide purchaser for a valuable consideration without notice was not available, for the reason that his purchase was before patent had issued.

This contention is presented in assignments of error I. to XIII., inclusive, and XXVIII. (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., pp. 13-18).

SECOND. That the charges of fraud and illegality against the entrymen named in the bill were established by the evidence.

This contention is presented in the assignments of error XIV. to XXIII., inclusive (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., pp. 15-17).

THIRD. That the defendant was not an innocent purchaser of said lands without notice, but took with notice, of the alleged fradulent and illegal acts of the entrymen named in said bill.

This contention is presented in assignments of error XXIV. to XXVII., inclusive (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., pp. 17-18).

Taking up these subjects of discussion, we will present them in the order named.

I.

THE DEFENSE OF BONA FIDE PURCHASER FOR A VALUABLE CONSIDERATION WITHOUT NOTICE WAS AVAILABLE TO THE DEFENDANT. THIS DEFENSE WAS ABSOLUTE AND PRECLUDED A RECOVERY BY THE GOVERNMENT FOR THE REASON THAT PRIOR TO THE COMMENCEMENT OF SUIT PATENTS HAD ISSUED FROM THE GOVERNMENT FOR SAID LANDS, AND THE FULL LEGAL TITLE TO THE SAME HAD VESTED IN THE DEFENDANT.

The purpose of this suit against W. A. Clark, the defendant, was to cancel the patents to land which he had purchased from the grantee of the original entrymen. The defendant purchased the lands in question from R. M. Cobban in good faith. He received from Cobban warranty deeds containing full covenants of warranty. He paid the full market value for said lands. The payment was in cash, and was received by Cobban at the time title passed to the defendant.

Before making the purchase there was produced for the inspection of defendant's attorney, an abstract of title showing that the lands had been entered at the United States Land Office, the Government price and the entry fees paid; the certificate of the Register and the final receipt of the Receiver of the land office therefor was produced, showing that the title had passed from the Government to the entrymen.

The abstract itself further shows that there was of record in the proper office of the county and state in which the lands were situated, warranty deeds from the entrymen to R. M. Cobban. Cobban, as appeared from the abstracts, was the owner of the lands. They were free from incumbrances, there were no liens thereon; the taxes had been paid and the unincumbered title then stood in Cobban himself.

Accompanying the abstracts were deeds executed by Cobban and his wife to the defendant, containing full covenants of warranty, which were submitted to counsel for the defendant for approval. The abstracts were

prepared by a reputable abstract company doing business in the county in which the land lay. There is no controversy but what the abstracts correctly showed the condition of the title. Upon the advice of counsel, duly submitted in writing, that the title to the lands was perfect in Cobban, and that the conveyance from Cobban and wife would carry with it a like perfect title to the defendant, the general manager of the defendant purchased for him the lands specified in each of the conveyances, numbering, all told, ten different deeds of conveyance, each conveyance constituting a separate and distinct transaction which was completely closed, and each transaction being entirely separate from any of the others. After the approval by counsel of the title to the lands and of the conveyances in form and substance, and the execution and delivery of the deeds, the purchase price was paid in cash to Cobban. In due time, and thereafter in the regular course of the procedure of the Department of the Interior, patents for these lands were duly issued, forwarded to the land office and delivered by the officers of the land office to the persons entitled thereto.

There is no testimony whatever introduced on the part of the Government to sustain the allegation of the bill that Cobban acted as the agent or representative of the defendant in procuring the entries to be made by the entrymen in order that the title gained from the Government should inure subsequently to the benefit of the defendant.

It is in evidence, specifically testified to by Cobban, by the defendant, by Mr. Bickford, the counsel for the defendant, and by Mr. Wethey, his general manager, that there was no agency or fiduciary character whatever evisting at any time between Cobban and the defendant. That Cobban never at any time attempted to negotiate with the defendant for the sale of any lands to which he did not have title; that before any negotiations were attempted or undertaken on the part of Cobban, the final receipt and certificate from the land office had been issued, warranty deeds executed by the entrymen and entrywomen to him, and this was made to appear by the abstract of title and documents presented to counsel for the defendant before any negotiations were undertaken or attempted whatever. It is further shown by the uncontradicted testimony of the defendant, of Mr. Wethey, of his counsel, Mr. Bickford, of Cobban, and others who were connected with the purchase by the defendant of the timber lands in question, that the defendant had no knowledge or acquaintance whatever with any of the entrymen or entrywomen. That he had no knowledge whatever of the manner in which the title to the lands was acquired by them from the Government. That he advanced no money for the purpose of making the entries, and was in no way connected in any manner with the said entries, and had no information or knowledge whatever, and no means of knowledge, that there had been any wrongful or im-

proper acts on the part of the entrymen or entrywomen in taking up said lands.

No attempt is made on the part of the Government to contradict this testimony; in fact, the Government does not attempt in any way to rebut the statements and evidence of the defendant and his witnesses, and the Government frankly admits, by failure to offer any testimony to the contrary, that the defendant purchased this land in good faith, paid a valuable consideration therefor; and had no notice and no means of notice of any alleged irregularities in the entries. That he took all precautions to insure a good title to himself. That the proceedings in the land office, so far as they appeared or were within the bounds of investigation, appeared to have been regular, in accordance with the rules and regulations of the Land Department and the acts of Congress. In fact, the testimony of all of the land officers who were called, is that these entries were regularly made in the ordinary course of procedure in the land office. That all the requirements of the law were fully complied with; and that all the details imposed by the rules and regulations of the department were complied with. That there was no circumstance connected with said entries that excited in the minds of the land officers or any person connected therewtih, a suspicion that the same were not regular. And it further appears that there was nothing in any of the entries that would cause any person dealing with the entrymen or entrywomen

to suspect that their motives had been other than that prescribed by law when they made their entries.

All the lands in controversy in this suit had been duly entered in the land office; final receipts and certificates had issued to the entrymen therefor; warranty deeds for said lands had been duly made, executed and delivered by said entrymen to Cobban, and placed of record in the proper counties; warranty deeds had been made, executed and delivered by Cobban and wife to the defendant, and placed of record; the purchase price had been fully paid by the defendant to Cobban for said lands; and patents from the United States had been issued and delivered—before any question was raised by the Government as to the validity and legality of the proceedings in the entry of said lands. This suit was the first direct attack made by the Government upon the validity and legality of the proceedings in the entry of said lands. Patents from the United States had issued long prior to the commencement of this suit.

The equitable title which had vested in the entrymen and entrywomen at the time of the issuance of the final receipts and certificates from the land office was merged in the perfect legal title evidenced by the patents of the Government. After patents issued, no title—legal or equitable—remained in the Government. The patents took effect by relation as of the date of the inception of proceedings on the part of the entrymen and entrywomen to enter said lands. The warranty deeds to Cobban, and from Cobban to the defendant, conveyed

not only the present title of the grantors, but all title subsequently acquired.

The right of the Government to attack the validity of the entries evidenced by the final receipts and certificates issued from the land office, did not continue as against a bona fide purchaser for a valuable consideration without notice, after patents issued. When patent issued, the Government parted with all its title—both legal and equitable. All that remained in the Government was an equity, as distinguished from an equitable estate, to seek in a court of equity to set aside the patents for fraud. And this was not available against a bona fide purchaser for a valuable consideration and without notice.

It is contended on the part of the Government that ~~that~~ because patents had not issued at the time of the purchase and conveyance to the defendant, ~~that~~ he ~~took issuance of patent by the Government~~ did not in any time become a bona fide purchaser for value, but that he took only a conveyance of the rights of the entrymen; stepped into their shoes, with no further or other rights than they possessed, and that the subsequent issuance of patent by the government did not in any way aid him in his defense. That thereafter, if it should be established that there was any fraud committed by the entrymen or entrywomen in the entry of the lands in question, the fact that the defendant had purchased prior to the issuance of patent precluded him from making the plea of a bona fide purchaser.

This position is without support in the authorities. This suit was brought to set aside patents of the United States already issued and delivered. The suit was based upon the fact that the legal title to the lands in question had passed from the Government by patents duly issued. Neither the legal nor equitable title was in the Government, but full legal title had vested in the successor in interest of the grantee of the Government. The Government, in this suit, therefore seeks to set aside a patent; and, for the purposes of this discussion, it is necessarily assumed as a fact that the legal title has passed to a bona fide purchaser for value without notice. The frauds charged are not such as prevented the passing of the legal title by the patents.

Such being the situation with reference to the title of the lands in question, and the character of the suit, the Supreme Court of the United States has recognized as settled law that it is a good defense to such an action that the title had passed to a bona fide purchaser for value without notice, and that to a bill in equity to cancel such patents the defense of a bona fide purchaser for value without notice is perfect.

In the case of United States v. Stinson, 197 U. S. 200, on page 204, the court says:

> "While the Government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to

such an action have been fully established. * * * (3) It is a good defense to an action to set aside a patent, that the title has passed to a bona fide purchaser for value without notice. And, generally speaking, equity will not simply consider the question whether the title has been fradulently obtained from the Government, but also will protect the rights and interests of innocent parties. United States v. Burlington & Missouri River Railroad Company, 98 U. S. 334, 342; Colorado Coal Company, v. United States, supra, p. 313—a case, in which, as here, suit was brought to set aside land patents on the ground that they had been obtained by fraud, and in which we said:

"'But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a bona fide purchaser for value without notice is perfect.'

"United States v. Marshall Mining Company, 129 U. S. 579, 589; United States v. California etc. Land Company, 148 U. S. 31, 41; United States v. Winona etc. Railroad Company, 165 U. S. 463, 479."

It is contended on the part of the Government that as to entries under the provisions of the Act of June 3, 1878, 20 Stat., 89, commonly known as the "Timber and Stone Act," these well-settled principles of equity juriprudence do not obtain, and that the clause "except in the hands of bona fide purchasers," in section 2 of said act, is to be interpreted by a different rule of construction from that adopted and long recognized by the Supreme Court of the United States. In support

of this position the Government relies upon the decision of this court in the case of Hawley v. Diller, 178 U. S. 476, and contends that the rule therein announced to the effect that purchasers from any entrymen before the issue of a patent are not bona fide purchasers who are protected against the cancellation, for fraud of the entrymen, of an entry made under the Timber and Stone Act, applies, notwithstanding the fact that in ignorance of said frauds, the officers of the Land Department subsequently allowed a patent to issue; the Government claiming that the only effect of the issuing of a patent is to change the forum from the Interior Department to a court of equity having jurisdiction.

The case of Hawley v. Diller does not sustain the position of the Government. The decision in that case goes no further than to uphold the well-recognized doctrine that so long as the legal title to the land is in the Government of the United States, and before patent has issued, there exists in the Department of the Interior a right to hold the entry for cancellation upon proper proceedings being taken to that end. The case does not hold that after the patent has issued any such right exists on the part of the Government through the Department of the Interior. On the contrary, the principle is therein recognized that when patent has issued, and the legal title has vested in the grantee of the Government, or his successors, the Government must seek redress, the same as any other litigant, in a court of equity. Its right has ceased to be a legal right, and has

become an equity. And, if it appears that the legal title has passed to one who was a bona fide purchaser of the lands in question, and who has paid the purchase price for the same before any notice of the alleged transgressions by which the Government was defrauded, such purchaser unites the legal title with the equitable right of an innocent purchaser, and the law must prevail.

The defense of bona fide purchaser for value without notice is a perfect bar to the equity of the Government.

It is further held that the words "bona fide purchaser," employed in said Act, were used in their technical sense, and that to be a bona fide purchaser within the protection of the statute a party must have acquired by his purchase and the conveyance to him a complete legal title.

The court recognized in that case the conclusive effect of the issuance of a patent. On page 487, it quoted with approval from the opinion of Attorney General Legare as follows:

> "The patent, it is needless to say, is the only complete legal title under our land laws. But to protect a purchaser under the plea of a purchase for a valuable consideration, without notice, he must have a complete legal title."

And again, the court quotes, with approval, from the decision of Secretary Noble, as follows:

> "It is therefore to be presumed, nothing appearing to the contrary, that Congress, in making use

> of the term in the Timber and Stone Act, did so in the light of such construction, and must have intended its use in the same sense as in the preemption law, namely, that to be a bona fide purchaser within the protection of the statute, a party must have acquired by his purchase and the conveyance to him a complete legal title."

Again, on page 490, the court quotes, with approval, from the decision of Judge Hawley in the United States Circuit Court of Appeals, as follows:

> "That the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee.

The necessary implication from these positions is that after patent issued, the control of the Interior Department over the disposition of said lands ceased; and that if the Government sought the cancellation of the patent, it must seek redress in a court of equity, where it is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. The position assumed by the Government that the effect of the issuance of the patent has been to change the forum from the Interior Department to a court of equity having jurisdiction, is doubtless correct. The effect, however, of this change, upon the manner of procedure, is of the most far-reaching consequence in determining the rights of the parties; and, until the issuance of the patent, and so long as the disposition of the lands is within the control of

the Interior Department, there are few restrictions upon the power of the officers of that department, and their authority is practically unlimited. When, however, the patent is issued, and the Government seeks to set aside that patent in a court of equity, as said in the case of United States v. Stinson, supra:

> "The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' Maxwell Land Grant Case, supra, p. 381; United States v. Iron Silver Mining Co., 128 U. S. 673, 677; United States v. Des Moines etc. Company, supra, p. 541."

The Government has no further or greater rights than any other litigant. It must be governed by the rules that prevail in courts of equity, and the recognized principles of equity jurisprudence must control the courts in their determination of the rights of the litigants before them.

As held in the case of Hawley v. Diller, supra, the words, "bona fide purchaser," are used in their technical sense, that is, in such sense as they have been employed in equity jurisprudence.

Such being the basis upon which must rest the interpretation of these words "bona fide purchaser," it becomes important to ascertain the decisions of the courts

of equity as to what constitutes a bona fide purchaser. By an unbroken line of decisions from the earliest times, courts of equity have held that if the purchase is originally of an equitable title without notice, and afterwards the party obtains or buys in a prior legal title in order to support his equitable title, and at the time of the commencement of the suit he was the owner of the full legal title as well as of the equitable title, he has a right to demand protection as a bona fide purchaser, and his plea as such is a perfect defense.

The fact that the defendant at the time of purchasing the lands in question, obtained only an equitable title, did not debar him from availing himself of the plea of a bona fide purchaser, because the legal title at the time of the commencement of the suit vested in him, and he was the owner of the full legal title as well as of the equitable title at said time; and, as a consequence, the strict requirements of the law for the successful interposition of the plea of a bona fide purchaser had been fulfilled.

But, as said by Judge Ross, in his opinion, in the Court of Appeals, in this case:

> "An innocent purchaser for value of an equitable title may always fortify that title by acquiring the legal title, and when he does so, it is a complete answer in a court of equity to one who asserts only a prior equity. 'Strong as a plaintiff's equity may be,' said the Supreme Court in the case of Boone v. Chiles, 10 Pet., 176, 209, 'it can in no case be stronger than that of a purchaser who has put

himself in peril by purchasing a title and paying a valuable consideration, without notice of any defect in it or adverse claim to it; and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief, which a court of equity imparts liberally.' * * * (Citing cases.) As a matter of course, when the Government comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances. No case has been cited which sustains the proposition of the complainant now under discussion, and we will not be the first to announce it." (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., pp. 6-7).

In 1 Pomeroy's Eq. Jur., sec. 417, the rule is laid down as follows:

"The meaning of the maxim is, if two persons have equal equitable claims upon or interests in the same subject matter, or, in other, words, if each is equally entitled to the protection and aid of a court of equity with respect of his equitable interest, and one of them, in addition to his equity, also obtains the legal estate in the subject matter, then he who thus has the legal estate will prevail. This precedence of the legal estate might be worked out by the court of equity refusing to interfere at all, and thereby leaving the parties to conduct their controversy in a court of law, where, of course, the legal estate alone would be recognized. One of the most frequent and important consequences and applications of this principle is the doctrine, that when a purchaser of property for a valuable consideration, and without notice of a prior equitable right to or interest in the same subject matter, obtains the legal estate in addition to his equitable

claim, he becomes, in general, entitled to a priority both in equity and at law."

And again, in section 740, the author says, speaking of the protection which will be extended to a bona fide purchaser:

> "It is also generally extended, in the similar suit by the holder of a prior equitable interest, to a defendant who, having originally been the bona fide purchaser of a subsequent equity, has afterwards obtained an outstanding legal estate."

This clearly recognizes the principle contended for that when the purchaser of the equitable right or interest obtains the legal estate in addition to his equitable claim, he becomes a bona fide purchaser, and entitled to maintain his defense as such in the court.

In the case of Fitzsimmons v. Ogden, 7 Cranch 2, on page 17, the court says:

> "Whether an equity arising to a third person, who claims the chose in action, and whose title depends upon a secret trust and confidence between him and the ostensible assignee, has equal equity with the person who afterwards purchases the judgment, bona fide, and without notice of a fact not disclosed by the previous assignments, is a question which the court deems it unnecessary to decide, because, though the equity of the trustees and the Holland Company should be admitted to be equal, yet the latter have acquired another title to the subject in controversy, which a court of equity will never disturb. They, or rather their trustee, have got the fruits of their execution, and have obtained the legal estate in the land on which the judgment gave them only a lien. Having at

least equal equity with the trustees, it was perfectly justifiable in them, to obtain a superiority, by buying in the legal estate."

To the same effect is the case of Thorndike v. Hunt, 3 De Gex & Jones, 563, 570, 571.

In the case of Newton v. McLean, 41 Barb. 287, the court says:

"The rule in equity is that as between two parties having equal equities, the prior equity must prevail; but, if the party having the subsequent equity clothes himself with the legal title before he has notice of the prior equity, such legal title must prevail."

In Story's Equity Jur., Sec. 64-c, the author in discussing this proposition says:

"And the equity is equal between persons, who have been equally innocent and equally diligent. It is upon this account that a court of equity constantly refuses to interfere, either for relief or discovery, against a bona fide purchaser of the legal estate for a valuable consideration, with notice of the adverse title, if he chooses to avail himself of the defense at the proper time and in the proper mode. *And it extends its protection equally, if the purchase is originally of an equitable title without notice, and afterwards, with notice, the party obtains or buys in a prior legal title in order to support his equitable title.*"

In section 411 the author says:

"Indeed, purchasers of this sort are so much favored in equity, that it may be stated to be a doctrine now generally established, that a bona fide purchaser for a valuable consideration, without

notice of any defect in his title at the time of his purchase, may lawfully buy in any statute, mortgage, or other incumbrance upon the same estate for his protection. If he can defend himself by any of them at law, his adversary will have no help in equity to set these incumbrances aside; for equity will not disarm such a purchaser, but will act upon the wise policy of the common law, to protect and quiet lawful possession, and strengthen such titles."

And in section 436 the author says:

"Indeed, the principle is more broad and comprehensive; and, although not absolutely universal * * * yet it is generally true and applies to cases of every sort, where an equity is sought to be enforced against a bona fide purchaser of the legal estate without notice, or even against a bona fide purchaser, not having the legal estate, where he has a better right or titile to call for the legal estate, than the other party."

And in Fonblanque's Equity, b. 1, ch. 4, sec. 25, note e., the author says:

"If, therefore, a subsequent incumbrancer, in order to protect himself against mesne incumbrances, obtains a conveyance of the legal estate, equity will not deprive him of his legal advantage, unless, at the time he lent his money, he had notice of the mesne incumbrance or obtained the conveyance of the legal estate after decree; for though the second or mesne incumbrance, be prior to the subsequent incumbrance in point of time, yet it furnishes a merely equal equity with the subsequent incumbrancer, who, having by greater diligence obtained the legal estate, shall be allowed to retain his advantage."

And in Sugden on Vendors, 2nd Am. ed., on page 519, the author says:

> "And it has been laid down as a general rule, that a purchaser bona fide, and for a valuable consideration, without notice of any defect in his title at the time he made his purchase, may buy, or get in a statute, mortgage, or any other incumbrance (and that, although it is satisfied), and if he can defend himself at law by any such incumbrance, his adversary shall never be aided in a court of equity for setting aside such incumbrance; for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous, viz., where the court hath refused to give any assistance against a purchaser, either to an heir or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another."

This principle was clearly established in the case of Boone v. Chiles, 10 Pet. 209, early in the history of the Supreme Court of the United States, in the following language:

> "It is a general principle in courts of equity, that, where both parties claim by an equitable title, the one who is prior in time is deemed the better in right, and that where the equities are equal in point of merit, the law prevails. This leads to the reason for protecting an innocent purchaser, holding the legal title, against one who has the prior equity; a court of equity can act only on the conscience of a party; if he has done nothing that taints it, no demand can attach upon it, so as to give any jurisdiction. Strong as plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril, by purchasing a title,

and paying a valuable consideration, without notice of any defent in it, or adverse claim to it; *and when, in addition, he shows a legal title from one seized and possessed of the property purchased, he has a right to demand protection and relief, which a court of equity imparts liberally. Such suitors are its most especial favorites. It will not inquire how he may have obtained a statute, mortgage, incumbrance, or even a satisfied legal term, by which he can defend himself at law, if outstanding; equity will not aid his adversary in taking from him the tabula in naufragio, if acquired before a decree. Relief will not be granted against him, in favor of the widow or orphan; nor shall the heir see the title papers; it is a bar to a bill to perpetuate testimony, or for discovery, and goes to the jurisdiction of the court over him; his conscience being clear, any adversary must be left to his remedy at law.*"

In the case of Hoult v. Donahue, 21 W. Va. 300, the court said:

"It is well settled that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate or title at the time of his purchase, or before he has notice of such prior equity, will be entitled to priority in equity, as well as at law, according to the maxim, 'Where equities are equal the law shall prevail.'

"While on the one hand, notice of a prior equity, given at any time before the completion of the purchase, will invalidate all steps which may be taken to complete it; yet on the other, when it is once completed, and the character of a bona fide purchaser acquired, notice will not be a bar to any future steps necessary for protecting and securing what has been purchased. *He who buys an*

equitable title in ignorance of its nature and under the belief that he is getting a good legal title, may, therefore, protect himself, by getting in the legal title, even where the effect is wholly to exclude equities prior to his own."

In the case of Basset v. Nosworthy, 2 Lead. Cases in Eq., 1, the court said:

> "As to the first point, a purchaser bona fide, without notice of any defect in his title at the time of the purchase made, may lawfully buy in a statute or mortgage, or any other incumbrance; and if he can defend himself at law by any such incumbrances bought in, his adversary shall never be aided in a court of equity by setting aside such incumbrances; for equity will not disarm a purchaser, but assist him. And precedents of this nature are very ancient and numerous, viz., where the court hath refused to give any assistance against a purchaser, either to an heir, or a widow, or to the fatherless, or to creditors, or even to one purchaser against another."

This case is the leading case upon the subject of bona fide purchaser for value, and in the learned note which is appended to that case numerous citations are made, to some of which we will refer. The rule is there laid down as follows, on page 5 of the note to said case:

> "Nor will a court of equity prevent a bona fide purchaser without notice from protecting himself, against a person claiming under a prior equitable title, by getting in the outstanding legal estate, because, as the equities of both parties are equal, there is no reason why the purchaser should be

deprived of the advantage he may obtain at law by his superior activity or diligence.

"And it is clear that a purchaser who pays, and procures the legal estate from an unsatisfied mortgagee, may hold it as against all mesne incumbrances of which he had no notice, before he completed his purchase, even if that were done *pendente lite*, provided it was done before a decree to settle priorities.

"To so great an extent has equity favored purchasers bona fide without notice, that it appears by Culpepper's Case, cited by Lords Commissioners Trevor and Rawlinson, in Sanders v. Deligne, Freem. Ch. Rep. 123, that where a man had bought gavel kind land of the eldest son, and paid his purchase money without knowledge that it was gavel kind, and afterwards for a song bought in the titles of the younger brothers, who were ignorant of their titles, it was yet held that they could not be relieved afterwards in equity, for it was said that the purchaser, having honestly paid his money without notice, might use what means he could to fortify his title. In Sir John Fagg's case, cited 1 Vern. 52, 'a purchaser came into a man's study, and there laid hands on a statute that would have fallen on his estate, and put it in his pocket; and in that case, he having thereby obtained an advantage in law, though so unfairly and by so ill a practice, the court would not take that advantage from him,' and in Harcourt v. Knowel, cited 2 Vern 159, a purchaser was allowed to take advantage of a release obtained from the grantee of a rent charge without consideration, and by fraud. * * *

"Where the equitable title of the purchaser, who had got in the legal estate, depended upon a forged will, he was held entitled to the protection of the court. See Jones v. Powles, 3 My. & K. 581. In

that case a person advanced money upon the mortgage of an estate claimed by the mortgagor under a will, which ultimately turned out to be forged, and got a conveyance of the legal estate then outstanding in a mortgage whose debt had been satisfied. Upon a bill being filed by the heirs at law, it was held, by Sir John Leach, M. R., that the mortgagee, being a purchaser without notice of the plaintiff's title, could protect herself by the legal estate. 'My impression,' said his Honor, 'at the opening of this case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice was impeached by reason of some secret act or matter done by the vendor or those under whom he claimed, but upon full consideration of all the authorities which have been referred to and the dicta of judges and text writers, and the principles upon which the rule is grounded, I am of the opinion that the protection of the legal estate is to be extended, not merely to cases in which the title of the purchaser for valuable consideration without notice is impeachable by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims where such asserted title is clothed with possession, and the falsehood of the fact asserted could not have been detected by reasonable diligence."

Again in a much stronger case cited in a note on page 7, the author proceeds:

"So in the recent case of Young v. Young, 3 L. R. Eq. 801, a testator, in 1832, devised his estate (which was then subject to a mortgage to one Talford) to his wife for life and then to his children. The will was never proved, and no notice of it was entered on the court rolls. The widow emigrated

in 1845, leaving her eldest son in possession of the estate as her agent. In 1851, the son falsely representing himself to be in possession of the estate as heir of his father procured a further advance upon mortgage of the estate, from W. Longrigg, who paid off the first mortgage to Talford, in whom the legal estate was vested by customary grant and admittance, and having taken a grant of the estate from Talford and the son, was, thereupon admitted tenant of the property. Longrigg, when he advanced the money was in perfect ignorance of the existence of the will, and believed that the son was the owner of the estate as heir of his father. The widow having died, it was held by Sir R. Malins, V. C., that Longrigg having the legal estate, without notice of any adverse title, was entitled to be protected against the rights of the children, and to tack his further advance. 'Here,' said his Honor, 'the heir at law was in possession and seems to have represented that he was in possession as heir, which is equivalent to a representation that there was no will, and being in such possession, he applies for a further advance. The will was not proved, and there was no entry of it on the court rolls; consequently, there can be no negligence attributable to Mr. Longrigg, and I must consider that he has all the rights that a purchaser for valuable consideration would have."

Again the author says:

"In a recent case, however, it has been held, that a bona fide purchaser for value, having the legal estate, will not be held to have notice of the contents of a deed, concealed from him at the time of his purchase, on the ground that he would be compelled to rely upon it in support of his legal title in an action of ejectment.

"Pilcher v. Rawlins, 7 L. R. Ch. App. 259."

In the latter case Lord Justice James said:

> "To my mind, there are to that supposition two short and conclusive answers—the one, a matter of principle, and the other, a matter of fact. My view of the principle is, that when once you have arrived at the conclusion that the purchaser is a purchaser for valuable consideration without notice, the court has no right to ask him, and has no right to put him to contest the question, how he is going to defend himself, or what he is going to rely on. He may say, honestly and justly, 'I am not going to tell you. I have got the deeds; I defend them, and you will never be able to produce secondary evidence of them. I am not obliged to produce them at all; probably, before you get half way through your action of ejectment you will find a *jus tertii* which you will not dispose of; the estate is in the hands of a legal tenant to whom I have let it, ad no one can determine that tenancy without notice, and no one can give that notice by myself; I will not give that notice, and no court has any power to compel me to give it. I have a right to rely, as every person defending his position has, on the weakness of the title of the person who is seeking to displace me.' That seems to be exactly the position of such a purchaser as this."

The author says further on page 10:

> "And not only where the purchaser has actually obtained, but where he has the best right to call for the legal estate, will he be entitled to the protection of equity."

Citing:

> Willoughby v. Willoughby, 1 T. R. 763.
>
> Blake v. Sir Edward Hungerford, Prec. Ch. 158.

Charlton v. Low, 3 P. Wms. 328.

Ex parte Knott, 11 Ves. 609.

The case of Warner v. Winslow, 1 Sandf. Ch. 430, also sustains the principle contended for here.

The principle upon which the plea of bona fide purchaser for value without notice is sustained is not that it is a rule of property, but, as said in Vol. 2 Pomeroy's Equity Jurisprudence, secs. 738 and 739:

> "The protection given to the bona fide purchaser simply means, therefore, that from the relations subsisting between the two parties, especially that which is involved in the innocent position of the purchaser, equity refuses to interfere and to aid the plaintiff in what he is seeking to obtain, because it would be unconscientious and inequitable to do so, and the parties must be left to their pure legal rights, liabilities and remedies; the court will not aid either against the other."

In section 739 the author says as follows:

> "In applying the doctrine of bona fide purchase —and this is the very essence of the doctrine— equity does not intend to pass upon and decide the merits of the two litigant parties; it does not decide that the title of the defendant is valid, and therefore intrinsically the better and superior to that of the plaintiff. On the contrary, the protection given by way of defense theoretically assumes that the title of the purchaser is really defective as against that of his opponent; at all events, the court of equity wholly ignores the question of validity, declines to examine into the intrinsic merits of the two claims, and bases its action upon entirely different considerations. If a plaintiff

holding some equitable interest or right, sues to enforce it against a defendant who has in good faith obtained the legal estate, the court simply refuses to interfere and do an unconscientious act by depriving him of the advantage accompanying such an innocent acquisition of the legal title. On the other hand, if the plaintiff is the legal owner, and sues to obtain some equitable relief against a defendant who is the innocent holder of some equitable estate or interest, the court in like manner simply refuses to do an unconscientious act by giving any aid to the plaintiff, but without at all deciding or even examining the intrinsic merits of their claims, leaves him to whatever rights would be recognized and whatever reliefs granted by a court of law. It is thus seen that the doctrine of bona fide purchaser, as administered by equity, is not in any sense a rule of property."

In the case of Knobloch v. Mueler, 123 Ill. 554, reported in 17 N. E. 696, on page 700 the court says:

"The defense of a bona fide purchaser had its rise in equity, upon the doctrine that a court of equity acts upon the conscience of him against whom relief is sought; and if he has done no wrong, or it would be unconscientious or inequitable to grant the relief, the court will refuse to exercise its jurisdiction. If, in equity and good conscience, the complainant should not obtain what he seeks, or the defendant ought not to suffer what is demanded, then the court will withhold its power. In theory, it is said the defense of a bona fide purchaser presupposes some defect in purchaser's title; but the court refuses to investigate the validity of the title of either party, upon the ground that good conscience does not dictate that he who has dealt honestly, in good faith, and without notice, should be deprived of the legal right he has thereby gained.

Id., sec. 739. There was formerly much apparent conflict in the adjudged cases as to when the defense of a bona fide purchaser would be availing. In Phillips v. Phillips, 4 De Gex, F. & J. 208, Lord Westbury grouped the cases in which a bona fide purchaser will be protected into three general classes, and reduced the doctrine to a formula, which it is said by Pomeroy (2 Eq. Jur. sec. 742) has been accepted, by subsequent judges almost without exception. The doctrine thus formulated, so far as applicable here, is: *Thirdly,* when there are circumstances which give rise to an equity, as distinguished from an equitable estate,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistake,—and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere.'

"Without extended discussion, it is apparent that the bill here filed seeks relief ancillary to the legal estate of appellee. The purpose of the bill is to remove the deed to appellant as a cloud upon appellee's legal title, and to enjoin the assertion of rights by appellant thereunder. The right to the relief sought exists, if at all, upon the equity arising out of the alleged mistake as to the title to said land in the grantor of appellant. This brings the case directly within the rule above given, which is sustained by the weight of modern authority; and, if appellant has made out his defense as bona fide purchaser, he should have prevailed in the court below."

In the case of the United States v. Cal. etc. Land Co., 148 U. S. 31, on page 40, the court quoted, with approval, the above quotation from Story's Eq. Jur., sec. 411, the quotation from Boone v. Chiles, and the above quotation from Colorado Coal Co. v. U. S.

This principle is so elementary, and the authorities so ancient and numerous that we would not attempt to cite them to the court were it not for the fact that counsel for the Government has persistently denied the principle upheld, namely, that where a person purchases and receives an equitable title and subsequently acquires the legal title, one who comes into equity cannot attack successfully his plea of bona fide purchaser for value, because the moment he obtains the legal title that necessarily must prevail; so, therefore, in this case when the appellee became the owner of the legal title, through the issuance of the patent of the United States to the entrymen and which inured to his benefit by reason of the covenants and warranties contained in the mesne conveyances by which the title passed to the appellee, the right of the Government to attack his plea of bona fide purchaser for value, upon the ground that he had only an equitable title to the land in question at the time of his purchase, was gone. A statement of this position seems to be too clear to require argument.

If the Government had the legal title, it certainly had no right to come into equity, but must seek redress in a court of law. Having only an equitable title, it came into equity seeking redress against one who had the legal title, and the well known maxim so clearly enunciated by the authorities above cited says that in such case the law must prevail. Therefore, the fact that at the time of his purchase the appellee had only an equitable title becomes immaterial, when at the time

of the commencement of the suit by the Government it appeared that the full legal title was then vested in him.

The fraud charged in the bill of complaint as against the entrymen was not such a fraud as prevented the passing of the legal title by the patents, and the patents conveyed the legal title. This is clearly established by the decision of the court in Colorado Coal Co. v. U. S. 123 U. S. 313, where it is said:

> "It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of a bona fide purchaser for value without notice is perfect.
>
> "In reference to such a case, it was said by this court, in United States v. Minor, 114 U. S. 233, 243: 'Where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value.' Meader v. Norton, 11 Wall. 442, 458. It is, indeed, an elementary doctrine of equity that where a grantor has been induced by fraud to part with the legal title to his property, he cannot reclaim it from subsequent innocent purchasers for value."

This question was presented to the Circuit Court of Appeals for the Eighth Circuit, in the case of United States v. Detroit Timber and Lumber Company, 131 Fed. 668; and in that case, Judge Sanborn, delivering the opinion of the court, said:

'The receiver's final receipts were not notice of fraud and perjury in their procurement. They were notice of honesty and legality in the proceedings that induced their issue. They were prima facie evidence that those who received them had the right to patents to the lands, and they raised the legal presumption that entrymen and officers alike had complied with the law. They were notice to the Detroit Company of the power of the Land Department to avoid them for fraud or error before the patents were issued, and of no other defect or danger, and the authorities cited for complainant express no different opinion. The Detroit Company took its equitable title to the timber subject to this notice, and subject to the possible exercise by the Land Department of this power. That department exercised the power, as the legal presumption was that it would exercise it, by affirming the validity of the voidable titles and by issuing the patents upon them. Here the effect of the notice from the purchase of the equitable titles ceased. The only reason that purchase gave notice of a voidable title was the fact that it did not acquire the legal title. The moment the legal estate inured to the benefit of the Detroit Company by the issue of the patents without notice of any fraud or irregularity in their procurement, its defense of a bona fide purchase was complete. It contained every essential element of a complete defense except the legal title before the patents were delivered. It was the lack of the legal title, and that alone, that made its defense vulnerable in the land office. When the patents had issued, the power of the Land Department had ceased, and the Detroit Company's position was conditioned by every attribute of that of a bona fide purchaser. Conceding that the indispensable elements of such a defense are absence of notice of the fraud or defect, good faith, payment of value, and the legal estate, it is not

material at what time or in what order the purchaser acquires them. It is only necessary that they all concur in him at the same time. It is indispensable to this defense that the consideration should be paid before notice of the defect. But it is not essential that it should be paid before or at the time the title is conveyed. It is sufficient if the payment is completed at any time before notice of the defect is received. It is not more essential that the legal title should be secured before or at the time when the consideration is paid. It is enough if it is acquired before notice of the alleged fraud or perjury is fastened upon the purchaser."

And again, on page 677, the court says:

"The purchase price had been paid in full. The legal title had been acquired. No notice of any fraud or perjury in the inception of, or of any defect in, the title which it had bought, and which had passed from the complainant to it when the patents were issued (Sandels & H. Digest, sec. 699), had been received. Why was not its defense that it was a bona fide purchaser impregnable? No satisfactory answer to this question has occurred to us, and our conclusion is that one who purchases in good faith and pays value for the equitable title to land of the Government evidenced by the receiver's final receipt, and who subsequently, and before receiving notice of any fraud or defect in his title, acquires the legal estate through the issue of the patent, is a bona fide purchaser, and his title is unassailable at the suit of the United States to avoid the patent for fraud or perjury of the immediate or remote grantors of the purchaser. Colorado Coal Co. v. U. S., 123 U. S. 307, 309, 322, 8 Sup. Ct. 131, 31 L. Ed. 182; U. S. v. Clark (C. C.) 125 Fed. 774, 776."

This decision of the United States Circuit Court of Appeals for the Eighth Circuit is referred to and quoted by Judge Ross in his opinion rendered in this case in the Court of Appeals, and the views therein expressed are adopted by him as the law.

The defendant was vested with all of the title which his grantor had, and inasmuch as patent had been issued before the commencement of the suit, the condition which prevailed as to his title at that time must prevail. The fact that he purchased prior to the issuance of patent cannot avail the Government in its attack upon his title, for the reason that his title had become perfect by the issuance of the patent. The patent to the entrymen inured to the benefit, under the covenants of warranty contained in the deeds, and the patent given to the purchaser of the Government land was not a new acquisition of title. It was a confirmation of a right which he had before the patent was made.

In the case of Irvine v. Irvine, 9 Wall. 617, on page 625 the court said:

> "The evidence in the case was, that prior to his deed to the defendant, to-wit, on the 21st of February, 1849, he had bought the land from the Government, and had paid all the purchase money. The patent subsequently given to him was, therefore, not a new acquisition of title. It was only a confirmation of the right which he had acquired before the deed was made."

Up to the time of the issuance of the patent the right of the Government, through the Department of the

Interior, to hold the entry for cancellation, and to take proceedings to that end upon notice to the parties interested, seems to be established by the authorities; but when the patent of the Government issued, it took effect as of the date of the inception of proceedings to enter the land. The patent having issued to the respective entrymen, it became conclusive of their right. That right which was acquired by them through the patent, inured to the benefit of the defendant. His right related back to the date of the inception of proceedings to enter the land. As said above, the patent is conclusive that the Land Department had jurisdiction and that all the steps requisite and necessary to that end had been taken, and the adjudication of the land office is conclusively presumed from the issuance of the patent.

The authorities upon this point are almost without number.

Silver Bow M. & M. Co. v. Clark, 5 Mont., 424;

Aurora Hill Con. Min. Co. v. 85 Min. Co., 34 Fed., 520;

Morgan v. Daniels, 153 U. S., 124;

Widdicombe v. Childers, 124 U. S., 405;

Coleman v. Hill, 44 Ark., 455;

Scott v. Lockey Inv. Co., 60 Fed., 35;

Shanklin v. McNamara, 87 Cal., 378;

Chever v. Horner, 11 Colo., 72;

Aspen v. Land Co., 10 Colo., 201;

U. S. v. Land Co., 148 U. S., 44;

Astiazaran v. Land & Min. Co., 148 U. S., 83;

Heath v. Wallace, 138 U. S., 575;

R. Co. v. Cannon, 54 Fed., 260;

U. S. v. Dalles Military Road Co., 41 Fed., 497;

R. Co. v. U. S., 36 Fed., 612;

Glidden v. Union Pac. R. C., 30 Fed., 661;

Smith v. Hollis, 46 Ark., 24;

Plummer v. Brown, 70 Cal., 546;

Keane v. Brygger, 3 Wash., 349;

U. S. v. San Jacinto Tin Co., 125 U. S., 273;

U. S. v. Mackintosh, 85 Fed., 338; 56 U. S. App., 493;

Hatch v. Ferguson, 57 Fed., 965;

Lewis v. Shaw, 57 Fed., 518; 70 Fed., 294;

Carroll v. Safford, 3 Howard, 461, 441;

Witherspoon v. Duncan, 4 Wall., 210;

U. S. v. Bell Tel. Co., 167 U. S., 240;

U. S. v. King, 83 Fed., 191;

Penn Life Co. v. Union T. Co., 83 Fed., 893;

U. S. v. N. P. R. R. Co., 95 Fed., 882;

Stimpson Land Co. v. Rawson, 62 Fed., 429;

Miller v. Donahue, 96 Wis., 509; 71 N. W., 904;

Johnson & Bridal v. L. Co., 24 Ore., 185; 33 Pac., 528.

U. S. v. Meeker, 50 Fed., 147.

In the case of Johnson v. Towsley, 13 Wall. 72, the court said:

> "That the action of the land office in issuing a patent for any of the public land, subject to sale by preemption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained."

In the case of Smelting Co. v. Kemp, 104 U. S. 640, the court said:

> "The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with."

In the case of Minter v. Crommelin, 18 How., 87, the court said:

> "The rule being that the patent is evidence that all previous steps had been regularly taken to justify making of the patent."

In the case of Hussman v. Durham, 165 U. S., 144, the Supreme Court held that

> "When the full equitable title has passed from the Government, even prior to the issue of a patent conveying the legal title, the land is subject to state taxation."

Citing:

> Carroll v. Safford, 3 How., 441;
>
> Witherspoon v. Duncan, 4 Wall., 210.

It was held by Judge Sawyer, in this circuit, in Pacific Coast M. & M. Co. v. Spargo, 16 Fed., 348:

> "The purchaser became the equitable owner of the land the moment he entered and paid for it and received his certificate of purchase. From that time the United States had no real interest in the land. It only held the dry legal title in trust for the purchaser, pending the usual necessary delay in issuing patents, and the patent only perfected the title, the right to which had already vested. Lands cease to be public lands when entered and paid for."

Citing:

> Carroll v. Safford, 3 How., 441;
>
> Witherspoon v. Duncan, 4 Wall., 210, 219;
>
> Hughes v. U. S., 4 Wall., 232.

The court further proceeds:

> "When the patent finally issues it attaches itself to the entry and relates to the date of the entry. It is regarded for the purpose of protecting the rights of the patentees against parties seeking to

acquire intervening rights, as if issued at the date of the entry. The entry and patent are regarded as one title. The title of the plaintiff dates from the date of the entry and payment and not from the date of the patent, and the reservation in the patent relates to that date, and therefore antedates the mining location of the defendants. The plaintiff in each case has the legal title to the mine as well as the land."

Citing:

Bagnell v. Broderick, 13 Pet., 450;

Gibson v. Chouteau, 13 Wall., 93;

Shepley v. Cowan, 91 U. S., 337;

Smelting Co. v. Kemp, 104 U. S., 647;

Hayner v. Stanley, 8 Sawyer, 225.

In the case of Coleman v. Peshtigo Lumber Co., 30 Fed., 317, the court said:

"It is contended by the defendant that after the entry, and prior to the issue of the patent, the purchaser had but an equitable title; that, therefore, only the equitable title was subject to taxation; and that the sale for the non-payment of such a tax, and a tax deed founded on such a sale, would convey only that title, which is insufficient as the basis of an action of ejectment to recover possession of the land. But this view ignores the doctrine of title by relation. And the decisions are to the effect that the patent confirms the entry, and relates back to the time of the entry; so that, if the lands are sold for taxes assessed intervening the date of the entry and the issue of the patent, the purchaser at such sale takes a legal title as against the former owner."

The doctrine is substantially sustained in the case of Northern Pacific Railroad Co. v. Myers, 172 U. S., 589.

To the same effect are the decisions of the Land Department, wherein is recognized the correctness of the principle hereinbefore enunciated.

In the case of Kern Oil Co. et al. v. Clark, 30 L. D., 550, it is said:

> "The right to a patent under said act once vested is for most purposes the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed, and takes effect on that date."

In the case of Carroll v. Safford, 3 How., 441, the court said:

> "Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are concerned, they are protected under the patent certificate as fully as under the patent . When sold, the Government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser, and a second purchaser takes the land charged with the trust."

See also

French v. Spencer, 21 How., 228.

In the case of Witherspoon v. Duncan, 4 Wall., 210, the court said:

> "In no just sense can lands be said to be public lands, after they have been entered at the land of-

> fice and a certificate of entry obtained. If subject to sale, the Government has no power to revoke the entry and withhold the patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain."

The right to a patent once vested is treated by the Government when dealing with public lands as equivalent to a patent issued. When in fact the patent does issue, it relates back to the inception of the right of the patentee so far as it may be necessary to cut off intervening claimants.

> Stock v. Stars et al., 6 Wall., 402.

In the case of Barney v. Dolph, 97 U. S., 652, the court said:

> "When the right to a patent once became vested in a settler under the law, it was equivalent so far as the Government was concerned, to a patent actually issued. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured, was, as to the Government, a transfer of the ownership of the land."

See also upon this same proposition:

> Wirth v. Branson, 98 U. S., 118;
>
> Lytle v. State of Ark., 9 How., 314;
>
> Simmons v. Wagner, 101 U. S., 260.

In the case of Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S., 428, the court said:

"There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists the full equitable title has passed to the purchaser with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the Government interests as against him."

Deffeback v. Hawke, 115 U. S., 392.

Nor is the foregoing principle in any sense antagonistic to the established doctrine of the jurisdiction and control of the Land Department over the disposition of public lands. The jurisdiction and control exists until the patent has been issued.

After the patent has issued the jurisdiction of the Land Department ceases, and it should be observed that a different principle of law applies to the determination of cases where a patent has issued and where the rights of the parties have been so far as the Land Department at least is concerned, adjudicated.

When the patent issues it relates back to the date of the initiation of the right, and no point can be made upon the question as to there being no patent issued at the date of the actual purchase by the defendant.

The case is to be considered and treated according to the condition of affairs which existed at the time suit was begun, as shown by the pleadings and by the allegations in the complaint that patent had issued for each of the entries mentioned. The issuing of the patent is conclusive as to all things which lead up to

the issuing of patent by the officers having charge thereof.

In the case of Talbot v. King, 6 Mont., 103, subsequently approved in the case of Chambers v. Jones, 17 Mont., 162, the court said:

> "All these matters pertaining to the issuance of a patent for a mining claim—the discovery and location, the marking and bounding, so that the claim may be identified and its lines readily traced, the notice, and the work and labor to be performed —are all matters that come before the Land Department, and are conclusively adjudicated therein. That department supervises the issuance of the patent. It is a special tribunal, created for that purpose; and, within the scope of its jurisdiction, its adjudications are final and conclusive."

In this case, therefore, the issuance of patent by the Land Department was a final adjudication of all the essential facts which led up to the issuing of patent and was conclusive as to the citizenship of the entryman; that he was of the requisite age; that he had never before made a timber and stone entry; that he made the same in good faith for his own exclusive use and benefit, and not for the use and benefit of any other person; that he had paid the purchase price demanded by the Government; that the United States had received the price; that the Land Department had passed upon these questions favorably,—these claims of the entrymen with reference to the particular tract of land embraced within each entry; that there was no contest over the claim, and that there was no doubt raised

as to the correctness of the proceedings of the officers of the land office in the issuing of final receipt. Therefore, when the land office acted upon the application to purchase; issued patents for the land embraced within the respective claims, the title of the United States was divested and conferred upon the grantee therein named, or his successor in interest, the full title to the land therein described, as of the date of the inception of proceedings to enter the same.

In the case of Lewis v. Shaw, 70 Fed., 289, the Circuit Court said as follows:

> "The implication is equally strong that the forfeiture does not extend to include rights or interests acquired in the land by a bona fide purchaser. Congress, in framing this law, seems to have recognized the injustice of permitting, after an entry has been made, and after the Land Department has taken proof of compliance with the law, accepted payment, and delayed for years to discover any ground for invalidating the entry, and after the lands have become enhanced in value, and sold for full value to an honest investor, the iniation of a contest to defeat his title upon new evidence. Such proceedings offer a temptation and premium to dishonest land jumpers to rob honest people, by giving false information to agents of the Land Department, who are, in most cases, willing to be gulled by tales of fraud in land entries. The idea that a purchaser of unpatented land cannot, under any circumstances, be a bona fide purchaser, has been exploded by the decision of the Supreme Court in the case of the U. S. v. California & O. Land Co., above referred to."

In the case of Colorado Coal Co. v. United States, 123 U. S., 307, above cited, the court said, on page 322:

> "For these entries Hunt sent to Jackson deeds duly executed, attested, and acknowledged, accompanied by Receiver's certificates in regular form, showing that the party named as grantor was entitled to a patent. These he was advised by counsel to accept, and did accept in good faith, as being equivalent to patents. In many instances the patents were issued before the deeds were excuted. Jackson had no connection whatever with making the proofs of preemption, and had no knowledge in reference thereto, except such as was disclosed by the deeds and certificates, in reliance upon which, and without visiting the lands or having them examined, he bought,"

and the court sustained the title of the purchaser of the lands.

In the case of United States v. California etc. Land Co., 148 U. S., 31, the Supreme Court sustained the title of the purchaser who purchased the land before the issuance of patent, as that of a bona fide purchaser for value.

In the case of United States v. Budd, 144 U. S., 154, above cited, the court held that the defendant, Budd, was a bona fide purchaser for value within the meaning of the law and entitled to the protection provided for.

The defendant in this case was entitled and is entitled to protection as a bona fide purchaser for value and without notice, because the issuance of the patent

conveyed a full title from the Government as of the date of the inception of proceedings to obtain title from the Government, and related back as if it had been issued on the date when the final receipt was given to the entryman by the Receiver of the Land Office.

U. S. v. Sierra Nevada Wood & Lumber Co., 79 Fed., 691;

Boone v. Chiles, 10 Pet. 177;

U. S. v. Winona St. P. R. Co., 67 Fed., 948., 960;

U. S. v. Southern Pac. R. Co., 76 Fed., 134, 137;

U. S. v. American Bell Tel. Co., 167 U. S., 240.

The Supreme Courts in many of the states have held to the rule announced in the Budd case, supra.

In the State of California, in the case of Thurston v. Alva, 45 Cal., 16, the court said:

"After a preemptor has made the necessary proofs, and paid for the land, and received a certificate of purchase, and before the patent issues to him, he may make a valid sale of the land."

See also Hudson v. Johnson, 45 Cal., 25;

Wicher v. Conklin, 84 Cal., 504.

In the case of Cady, Admin., v. Eighmey, 7 N. W., 102, the court said:

"A certificate of purchase issued by the United States to a preemptioner vests in him an equitable title that he can convey, and where he has conveyed the same, the subsequent issuance of the pat-

ent therefor will inure to the benefit of his grantees."

In McDaniel v. Large, 7 N. W., 632, the court said:

"One who has purchased lands from the United States has an equitable title therein which he can sell and convey before the issuance of the patent, and after-acquired title will inure to the benefit of his covenantees."

Again, in Cavender v. Smith (Iowa), 56 Amer. Dec., 541, the court said:

"A certificate of purchase from the United States Land Office issued prior to patent, conveys the absolute title, and a patent subsequently acquired relates back to the date of said certificate."

See also:

Lang v. Maury, 12 Amer. St. Rep., 748;

Lewis v. Weatherhill, 1 Amer. St. Rep., 674.

In McKean v. Crawford, 6 Kan., 70, the court said:

"The right to transfer his land is complete in the preemptor from the date of his entry and purchase thereof, and the receipt of the usual certificate therefor, and if he exercised such right before a patent has issued to himself, such patent inures to the benefit of his grantee."

See also:

Stewart v. Powers, 33 Pac., 486;

Frinck v. Hocke, 56 Pac., 1093;

Norris v. Heald, 39 Pac., 1121;

People v. Swift, 96 Cal., 165;

Farris v. Deming Investment Co., 49 Pac., 926;

Richards v. Snyder, 6 Pac., 186;

Myers v. Croft, 13 Wall., 291.

In the case of United States v. Detroit Timber & Lumber Co., 124 Fed., 393, this very question was discussed, in which case the court said:

> "It matters not, therefore, whether the Martin-Alexander Lumber Company obtained a legal title to the property, or whether the Detroit Timber & Lumber Company acquired a legal title to the property, when the timber or lands were first purchased. They at least had the legal title when this bill was filed, because the patents had been issued, and whatever title the entrymen acquired had inured to their benefit. This is made so by the statute of the state. That principle would be enforced in a court of equity even without the statute."

Under the foregoing authorities, the right of the defendant to maintain his plea of bona fide purchaser for value and without notice, is absolute.

His title is evidenced by warranty deeds given by the entrymen and entrywomen to Cobban and by warranty deeds by Cobban and wife to him. The full purchase price was paid; the patents were issued by the Government, and not until long after the patents were issued did he have any notice whatever that there was any controversy over the question of whether fraud had been committed in the entries.

In the case of Hawley v. Diller, supra, the land was

entered at the land office, a final receipt was issued, a special agent made an investigation. The entry was subsequently suspended, and an order was issued that the entryman should appear and show cause why his entry should not be cancelled. A hearing was had, and decided in favor of the entryman. Subsequently the proceedings came before the department, and after a further hearing the entry was cancelled and the land held subject to entry as public land of the United States. Diller entered the land and obtained title thereto by patent of the United States. Hawley and others brought a suit in the United States Court for the District of Washington, setting forth the facts, and asking that the patent held by the defendants be declared a cloud upon the title of the plaintiffs, and that the defendant be decreed to hold the title in trust for them, and requiring a conveyance to them of whatever title he had acquired by virtue of the patent. The predecessor of Hawley, the plaintiff, never received a patent from the Government. His only title was a final receipt issued from the land office, which was held for cancellation, and the entry was subsequently cancelled. The suit was based upon the allegation that Hawley was a bona fide purchaser for value, without notice, and therefore entitled to protection under the law.

The court held in that case that the right remained in the Government of the United States to proceed through the Interior Department and cancel the entry,

and that this right continued up to the issuance of patent. The court said:

> "The assignee took only an equity, and he took it, of course, subject to all prior equities. *The patent, it is needless to say, is the only complete legal title under our land laws. But to protect a purchaser under the plea of a purchase for a valuable consideration, without notice, he must have a complete legal title.*"

Here the court recognizes the fact that if the legal title was perfect and complete under the patent of the United States, the plea of bona fide purchaser for value without notice would have been available, and that the plaintiff could necessarily have prevailed in the action.

The court further said:

> "It is therefore to be presumed, nothing appearing to the contrary, that Congress, in making use of the term in the Timber and Stone Act, did so in the light of such construction, and must have intended its use in the same sense as in the preemption law, namely, that to be a bona fide purchaser within the protection of the statute, a party must have acquired by his purchase and the conveyance to him a complete legal title."

The court further quotes from the decision of Judge Hawley, in the case of the American Mortgage Co. v. Hopper, 29 U. S. App., pages 12, 17:

> "That the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee."

The contention on the part of the Government that the case of Hawley v. Diller, is the same in principle as the case at bar, is based upon a failure to distinguish between a case where the Land Department has jurisdiction of a matter pending before it, and where the Land Department has lost jurisdiction by performing the final act delegated by law to that department by issuing the patent.

In the case of Hawley v. Diller the legal title had not passed from the Government of the United States, to the plaintiff or his predecessor in interest. The Land Department retained jurisdiction and had the subject-matter under its control. The case hinges upon the question as to the power of the officers of the Land Department to act upon it while the matter is still before the department and before the issuance of patent.

The question considered by the court is as to who is a bona fide purchaser before patent issued, and not afterwards. The decision deals with the question from the standpoint of a case where no patent has been issued. That is an entirely different condition from that where the action is brought for the express purpose of cancelling a patent already issued and delivered. While it may be true that at the time of the purchase of the land in the case at bar, the dry legal title remained in the United States, yet when before the commencement of the action the full legal title passed by patent to the entrymen and inured to the benefit

of the grantee, the defendant herein, a different rule must prevail. The case must be treated upon the conditions existing at the time of the commencement of the suit, when the defendant was vested with all the right that could be conveyed by patent. The Land Department had lost control of the case; had lost the right to cancel the entry, and its power over the patent had ceased. The purchaser from the entrymen may have acquired no better right to the land than the entrymen had to convey, and this right may have been subject to the subsequent action of the department, as is said in Myers v. Croft, 13 Wall., 291, yet when the Land Department proceeded with the case so far as to issue the patent, all subsequent proceedings must be had in contemplation of the patent and the rights conferred thereby. As said in that case:

> "The patent, it is needless to say, is the only complete legal title under our land laws."

Therefore, under the conditions existing at the time of the commencement of this suit, the defendant had a complete legal title. As said by Judge Knowles, in his opinion in this case, referring to the authorities cited and relied upon by the Government:

> "In all of the above cited cases no patent had been issued by the Government to the entrymen, and pending such issue of patent, and while the Land Department of the Government had still full jurisdiction over the matter, the entries were cancelled and patents refused.
>
> "The purchasers from the entrymen had made

their purchase after the issue of certificates of purchase, but before the issue of patent, and claimed that the Land Department of the Government could not lawfully cancel such entries, and contended that they stood in the same position as if a patent had been issued to the entrymen.

"Under the practice of the Land Department of the United States any allowance of an entry for a patent can be recalled for sufficient reasons at any time before the actual issue of the patent therefor, and the entry of the applicant cancelled. Any one purchasing from an entryman who has received his final certificate of purchase only, purchases such interest in the land as the entryman has, subject to the right of the Land Department of the Government to review its action and refuse to issue the patent; this is a well known practice and often resorted to, and any one purchasing from an entryman who has not obtained a patent, must take notice of the same; hence a purchaser under such circumstances is not entitled to the protection accorded an innocent purchaser for a valuable consideration and without notice. That is all that was decided by the cases above cited.

"In the case at bar the Land Department had made no withdrawal of its approval of the right of the entrymen to a patent, but on the contrary, issued a patent to each of them, which they now hold, and has converted an otherwise equitable title into a full, legal title, and under the laws of Montana their after-acquired title inured to the benefit of the defendant Clark. (See Sec. 1512, Civil Code of Montana.)

"The jurisdiction and power of the Land Department over these entries ceased wholly when the patents were issued, and it could not recall the same.

"U. S. ex rel. McBride v. Carl Schurtz, Secretary of the Department of the Interior, 102 U. S., 408.

"It has often occurred that parties have purchased land from entrymen who had received certificates of purchase of the land sold, and subsequently patents have been issued therefor. In none of hese cases has it been contended that the purchaser to whom the title inured after issue of the patent, was not considered entitled to the rights accorded to a bona fide purchaser under the law, if he was without notice of any fraud committed by the entrymen." (Opinion, Knowles, Judge, Rec. Vol. Pl. & Ind., pp. 60 to 62.)

The position assumed by counsel for the Government is that all proceedings had with relation to the entry of the lands in controversy, in the land office, were so permeated with fraud from the commencement, that the same were void absolutely, and that no legal title passed from the Government to the entrymen, or to their successors in interest. And it is upon this basis alone that the contention of the Government rests. There is, however, no merit in the position assumed. The legal title passes from the Government upon the issuance and receipt of the patent. The only exceptions are set forth in the case of Moffat v. United States, 112 U. S., on page 32, as follows: 1st, where the patents are issued to fictitious persons; 2nd, where the signatures to the patent are found to be forgeries. And upon this subject, the court said:

"To the application of this doctrine of a bona fide purchaser there must be a genuine instrument having a legal existence, as well as one appearing

> on its face to pass the title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties at all, however much deceived thereby the purchaser may be."

No such claim is made by the United States in this case. The entrymen were actual persons; the patents were actually issued and signed by the proper officers of the Government, and the decision of the court in Colorado Coal Company v. United States, supra, is conclusive that the patent conveyed the legal title. When the legal title, therefore, evidenced by the patent of the United States, to the lands in controversy, vested in the defendant, his right to avail himself of the defense of a bona fide purchaser for value without notice became absolute; and said defense, when established by the testimony, was a perfect bar to the right of the Government to recover in this suit against him.

II.

THE CHARGES OF FRAUD AND ILLEGALITY IN THE BILL OF COMPLAINT FILED IN THIS CASE AGAINST THE ENTRYMEN NAMED ARE WHOLLY UNSUSTAINED BY THE PROOF.

The discussion under this head naturally divides itself into three branches:

1. The issues raised by the pleadings;

2. The evidence found in the record upon each of said issues; and,

3. The law relative thereto as it has been applied by the courts in cases of like character.

Issues Raised By the Pleadings.

The complainant, in order to maintain the issues on its part, as alleged in the bill of complaint and denied in the amended answer of the defendant, must have established the following ultimate facts:

I.

That the applicants to purchase the land, each swore falsely in the written statement filed by them in the land office when they deposed that they did not apply to purchase the same on speculation, but in good faith to appropriate it to their own exclusive use and benefit; that they had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title they might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except themselves.

II.

That no purchase money paid at the Missoula Land Office for the land entered by said applicants was furnished by them, but, on the contrary, the same as well as all moneys paid for the land office fees in connec-

tion with said entries, as well as the personal expenses of said applicants and their witnesses, were furnished and paid directly, or through agents, by R. M. Cobban in pursuance of an agreement by said applicant that such lands should be conveyed to him as soon as possible after final proofs were made, the fees upon such entries and the purchase money paid, and the Receiver's final receipt therefor issued.

III.

That a contract was entered into by and between R. M. Cobban upon the one part and C. L. Griswold upon the other, said contract dated May 22nd, 1899, and that said contract was for the benefit of the defendant W. A. Clark for the express purpose in said contract set forth, of obtaining lands from the complainant, and which contract could only be carried out and accomplished by procuring false and fraudulent statements in writing under oath, and false and fradulent proofs to be reduced to writing and sworn to and subscribed by the parties who should enter said lands in tracts not to exceed 160 acres. That John B. Catlin was associated with said Griswold and Cobban, and that said Catlin, Griswold and Cobban, through themselves and others, examined the lands, procured various persons for hire to enter the same at the United States Land Office, paid their expenses, the expenses of their witnesses, the land office fees and the price therefor at said land office, and that thereupon in pursuance of said

employment took deeds to said Cobban from said entrymen for said lands, and thereupon said Cobban conveyed the same to defendant.

IV.

That the deeds and patents were obtained and procured by said Cobban for defendant's use.

V

The entire case of the Government rests upon the testimony of C. L. Griswold. Therefore, it was necessary that the witness C. L. Griswold should be a credible witness and his testimony entitled to belief.

Taking Up Now Each Specific Issue as Set Forth, We Will Investigate the Evidence Upon Each of Said Issues.

FIRST.

The complainant did not establish that the applicants to purchase the land, each swore falsely in the written statement filed by them in the land office when they deposed that they did not apply to purchase the same on speculation, but in good faith to appropriate it to their own exclusive use and benefit; and that they had not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever by which the title they might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except themselves.

The allegations of the bill with reference to each

entryman and entrywoman are identically the same, and the testimony in the record relative thereto is practically identical in each case. For the purpose, therefore, of brevity in the presentation of the evidence upon these issues, we will take up the evidence presented as to Harriet Bryan and Eveline Jemison as typical of the testimony presented relative to each entry attacked.

The entry of Harriet Bryan was designated as Cash Entry No. 1101. Referring to this cash entry witness Griswold, who was a witness for said Harriet Bryan in the final proof before the land office, was interrogated on cross-examination as follows:

> "Q. You were asked in that connection, the following: 'Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself?' to which it appears that you answered, 'Not to my knowledge.' Is that your answer to that question?
>
> "A. I think it was.
>
> "Q. Did you know at the time you made that answer that it was not true?
>
> "A. I did.
>
> "Q. And you intended wilfully at that time to answer that question falsely?
>
> "A. I did. I had to do it under my contract with Mr. Cobban.
>
> "Q. And you testified falsely upon the hearing in this matter. In other words, committed perjury

in this case, for the purpose of getting the money on this entry?

"A. By hearsay.

"Q. What do you mean by hearsay?

"A. I said there was an agreement by which this land was to be acquired and transferred to Mr. Cobban.

"Q. And when you said, 'No, I have no knowledge,' you did have knowledge.

"A. Yes, sir; that is, hearsay knowledge." (R. V. 1, pp. 217, 218, 219.)

The witness Griswold, although expressly interrogated by counsel concerning that matter, did not and would not testify that Harriet Bryan had made any contract or agreement by which she was to enter her claim and convey the same after receiving the final receipt to Cobban for $100 or any other sum. (R. V. 7, pp. 3461, 3462, 3478.)

The Receiver's receipt No. 1111 to Harriet Bryan for the land entered by her, according to the testimony of William Q. Ranft, Receiver of the Land Office at Missoula, was sent to R. M. Cobban at Missoula on September 7, 1899. (R. V. 2, p. 669.) According to the testimony of Elmer E. Hershey, Register of the Land Office at Missoula, Harriet Bryan made sworn statement No. 259, June 27, 1899, for the land described in the complainant's bill. The notice of publication was published in the Missoulian, and C. L. Griswold, Thomas B. Bryan, Leliah T. Bryan and Edgar Lehman were named as witnesses. Final proof was made Sep-

tember 14, 1899, before William Q. Ranft, Receiver. Edgar Lehman and C. L. Griswold appeared as witnesses. On the same date receipt and final certificate were issued. Patent was transmitted August 7, 1900. (R. V. 2, p. 917.)

Patent was issued to Eveline Jemison to the land in question under said entry June 28, 1900. (R. V. 2, p. 986.)

The testimony of Harriet Bryan (R. V. 3, pp. 1330 to 1361) is that her name is Harriet Frances Bryan, wife of Thomas Bush Bryan, mother of eight children, and had been married 25 years. That her husband is a laborer; has worked upon a ranch. That they lived on the Blackfoot, in Missoula county, and were living at the time of her testimony in Missoula. That she took up a claim under the Timber and Stone Act. That she went upon the claim and examined it, was qualified to enter land, being over 21 years of age, and never having exercised her right of entry before. That the land entered by her was of the kind and character required, namely, timber land, and more valuable for timber than for agricultural purposes. That she procured the money to make the entry of Mr. Bryan, her husband, and used it to pay for the land and the land office expenses at the land office. That after the land was entered and the final receipt issued, and the law had been fully complied with in all respects, she with others, went to the office of Mr. Cobban. That she had never met Mr. Cobban before; and had never talked with

Mr. Griswold about the land or the sale of it prior to that time. She had never, as a matter of fact, had any conversation with anybody about selling it, except her husband. She had not prior to the final receipt bargained or agreed to sell the land to any person, and had made the entry of the land for her own benefit. That there was never at any time before final proof any agreement by which she was to sell the land to anybody, nor did she authorize her husband to make any bargain or agreement to sell the land, and at the time of the final proof and the time of receiving the receipt from the land office the land was entirely and wholly hers. That she intended to sell the land to the person who would give her the most money, but that there was never at any time any contract or agreement to sell it, nor was there any obligation on her part to sell said land to any particular person whatever prior to the final receipt which was issued therefor.

On the part of the defense, the testimony of the witness Walter M. Bickford is that he was the attorney for the defendant. That he acted professionally in examining the abstracts of title to the lands conveyed to the defendant, and that the object of such examination was to ascertain the ownership of the lands covered by said abstracts. That he examined the abstracts covering the lands specified in the bill of complaint, with the exception of one entry, and approved the abstracts. That there were accompanying the abstracts warranty deeds from R. M. Cobban and his wife to

defendant. That these deeds were also examined by him professionally and as attorney for the defendant, and he approved the same as conveying a perfect title to defendant. That the price named in the deeds as the consideration was the true, actual purchase price paid by the defendant for the land. (R. V. 7, pp. 3682 to 3687.) That he examined the abstract of title to the land entered by Harriet Bryan, being abstract No. 64, and approved the same. (R. V. 8, p. 3968.) After the abstract was approved, it was delivered to Mr. A. H. Wethey, the manager of the defendant's business, with the approval of counsel in writing.

R. M. Cobban testifies that he neither sent nor accompanied Harriet Bryan upon the land in question, and had nothing whatever to do with her entry. (R. V. 10, p. 5219.)

R. M. Cobban also testifies on cross-examination to certain checks paid to Harriet Bryan of date September 4, 1900, the total amount being $548.50, and the deed from Harriet Bryan and her husband to R. M. Cobban is referred to as complainant's exhibit No. 87. (Rec. Vol. 11, pp. 5511 to 5515.)

This is all the evidence introduced on the part of the Government of the United States, either upon the direct examination of its own witnesses or the cross-examination of the defendant's witnesses, to establish the allegations of its bill that the entry of Harriet Bryan was obtained by false and fraudulent testimony, and that

by reason of the fraud the title of the defendant to said land shauld be declared void and a conveyance from him decreed to the complainant, the United States.

On the other hand, the evidence on the part of the defendant, as we will subsequently show, conclusively established that there was no fraud, no contract or agreement, and no act done, directly or indirectly, actually or constructively, in violation of any law of the United States in said entry.

As to the entry of Eveline Jemison, the other entry-woman specified in the bill of complaint, the evidence of fraud and bad faith is even less persuasive than that of Harriet Bryan. Witness Griswold testifies that he had never seen Eveline Jemison. (Rec. Vol. 1, p. 115.) He thought that she was the mother of Albert Jemison; that she was about 70 years old, and lived about eight or nine miles west of Clearwater with her husband. (Rec. Vol. 1, p. 116.) He also testifies in regard to the entry of Eveline Jemison, No. 1136, that he was a witness for her; that he did not know the applicant had directly or indirectly made any agreement or contract in any manner with any person whomsoever by which the title she might acquire from the Government of the United States would inure in whole or in part to the benefit of any person except herself; that his answer was true, and that he was never present at any time when Eveline Jemison prior to the time that she made final proof made any contract or agreement with any-

body that she would convey the land to them. (Rec. Vol. 1, p. 496.)

Albert Jemison testifies that he was a witness for Eveline Jemison, his mother. That there was never any understanding or agreement or arrangement in any manner or with any person or corporation, or any one else, that the land was to be conveyed to another person when the final proof was made. (Rec. Vol. 2, p. 545.)

The patent to Eveline Jemison is dated June 28, 1900, and the deed from Eveline Jemison and husband to R. M. Cobban is dated October 7, 1899. (Rec. Vol. 2, p. 611.) The Receiver's receipt No. 1136 to Eveline Jemison for the land described in the bill of complaint as entered by her was issued to Eveline Jemison by the Receiver of the land office October 7, 1899, and duplicate thereof was sent to her at Victor, Montana, October 9, 1899. (Rec. Vol. 2, p. 671.) Eveline Jemison, according to the records in the land office at Missoula, Montana, as appears by the testimony of Elmer E. Hershey, the Register of the land office, made and filed her sworn statement No. 279 July 31, 1899, for the land described as entered by her in the bill of complaint. The notice was published in the Missoulian. Sarah Yarger, Laura Roll, C. L. Griswold and Albert Jemison were named as witnesses. On October 7, 1899, final proof was taken before William Q. Ranft, Receiver, with C. L. Griswold and Albert Jemison as witnesses. Final receipt was issued on said day, and on the 7th of

August, 1900, patent was transmitted to the Land Office from the Department. (Rec. Vol. 2, p. 922.)

The testimony of Eveline Jemison is found in volume 8, pages 1308 to 1327. She states that she is 65 years of age, the mother of eight children; that her home is on the Blackfoot, or on the Clearwater, in Missoula County. That they have lived there for eight years. That they had a little place on the Bitter Root at one time, where they kept a hotel or stopping place. That they had some land (80 acres) in the Bitter Root. That she filed on the claim described in the bill of complaint. That there was a number of her family filed on claims in that vicinity. That they made their final proofs on the 7th of October. That Mr. Catlin was her attorney and attended to the business in the land office for her. That they carried the money down to the land office themselves and paid for the land. That she had the money herself as well as the others. That she had never seen Mr. Cobban until after the final proof was made. That her daughter got the money from the bank. She also testified that she had intended to take up a claim for some years prior to that time. They had tried to borrow the money from the Big Blackfoot Milling Company to take up the claim, but she had not been able to do so. She was promised the money, but she could never get it. That they knew the land was there, but they kept still about it so that they could go on the land and take it up when they got the money, but they were a long

time in getting the money. That at no time prior to the time that she filed on the land was there any promise or agreement with anybody to convey the land, nor was there any agreement that she would sell the land or was going to sell it after they secured title. They intended to sell the land to any one who would pay them for it. That they had entered into no negotiations whatever to sell it to anybody prior to final proof. That her daughter had money in the bank, and they were going to use that for the purpose of paying for the land, and that the final receipt was sent up to Victor where she got it. She had left directions that they should send the final receipt to her. That she paid the money herself to the land office. That they tried to sell the land to two or three people, and finally sold it to Mr. Cobban. She further says that she took up the land for her own exclusive use and benefit and not for the use or benefit of any one else.

The testimony of Judge Bickford is that he examined, as attorney for defendant, abstract of title No. 25, showing the issuance of the final receipt from the land office to Eveline Jemison for the land in question, and a warranty deed from Eveline Jemison and her husband to R. M. Cobban. That he found the title was perfect and approved of the same. (Rec. Vol. 7, p. 3694.)

The testimony of R. M. Cobban is that he did not at any time send or accompany Eveline Jemison to the

land taken up by her, and had nothing whatever to do with her entry. (Rec. Vol. 10, p. 5219.)

This is all of the evidence introduced by the Government to support its allegation of fraud and bad faith and perjury in the entry of Eveline Jemison. It appears further that the Government had procured the indictment of both Eveline Jemison and Harriet Bryan for perjury in connection with these entries, apparently upon the testimony of the witness Griswold alone.

The first issue, therefore, it is clear, is utterly without support in the testimony of the witnesses. In this connection we will say that the testimony is equally ineffectual in regard to every entryman and entrywoman who entered any of the land specified in the bill of complaint. There is no evidence whatever to support the allegations of the bill in regard to the falsity of the declaratory statement filed except the testimony of *Griswold*, concerning whom we shall speak later on, and his testimony should be without weight, and is largely irrelevant and incompetent to the issues.

SECOND.

The complainant did not establish that no purchase money paid at the Missoula Land Office for the land entered by said applicants was furnished by them, nor that the same as well as all moneys paid for the land office fees in connection with said entry, as well as the personal expenses of said applicants and their witnesses, were furnished and paid directly, or through agents, by R. M. Cobban in pursuance of

an agreement by said applicants that such lands should be conveyed to him as soon as possible after final proofs were made, the fees upon such entries and the purchase money paid, and the Receiver's final receipt therefor is issued.

The evidence of Harriet Bryan above quoted clearly establishes that she did furnish the money which was used to pay the expenses of the land office, the expenses of her witnesses, the personal expenses of herself, and the price paid the Government for the land entered by her. There is no evidence of any kind or character that the money was furnished and paid directly or through agents by R. M. Cobban in pursuance of an agreement by said Harriet Bryan that such lands should be conveyed to him as soon as possible after final proofs were made, the fees upon such entries and the purchase money paid, and the Receiver's final receipt therefor issued.

The evidence quoted above is all the evidence upon the entry of Harriet Bryan, and clearly establishes a state of facts contrary to that claimed by the Government upon this head; and the Government offered no testimony in support of the issue so tendered by it.

The evidence quoted above is all the evidence upon the entry of Eveline Jemison, and clearly establishes a state of facts contrary to that claimed by the Government upon this point; and the Government offered no testimony in support of the issue so tendered by it.

An examination of this record, voluminous in the extreme, filled with all kinds of improper, irrelevant

and immaterial testimony, conducted apparently without any regard to the rules of orderly procedure in courts of justice on the part of the counsel for the Government, makes it apparent that not one piece of competent, relevant or material evidence was introduced by the Government to support any of the issues tendered by the Government in its bill of complaint as against any single entryman named in said bill, or as to any particular piece of land set forth in said bill. Each entryman was called as a witness and testified, and by his testimony established an exactly contrary state of facts to that claimed by the Government in its bill. It appears that each entryman and each entrywoman furnished the purchase money to be paid to the Government for the land; that all money paid for land office fees in connection with said entry, as well as the personal expenses of the entryman and entrywoman and their witnesses, were paid by the entryman or entrywoman; that none of the money was furnished or paid, directly or through agents, by R. M. Cobban in pursuance of any agreement with such entryman or entrywoman that such land should be conveyed to him as soon as possible after final proofs were made, the fees upon such entries and the purchase money paid, and the Receiver's final receipt therefor issued. Not one single piece of evidence appears to establish the vital allegations of the bill in this respect. The contrary is clearly established by overwhelming testimony, and the case of the Government in this respect is with-

out the support of a single witness. Not even *Griswold* testifies to a single fact upon his own knowledge in this connection. The record itself is conclusive upon this point.

THIRD.

The complainant did not establish that a contract was entered into by R. M. Cobban for the use and benefit of defendant W. A. Clark, with C. L. Griswold, of date May 22, 1899, for the express purpose in said contract set forth, of obtaining lands from the complainant, and which could only be carried out and accomplished by procuring false and fraudulent statements in writing, under oath, and false and fraudulent proofs to be reduced to writing and sworn to and subscribed by the parties who should enter said lands, in tracts not to exceed 160 acres. That John B. Catlin was associated with said Griswold and Cobban, and that said Catlin, Griswold and Cobban through themselves and others, examined the lands, procured various persons for hire to enter the same at the United States Land Office, paid their expenses, the expenses of their witnesses, the land office fees and the price therefor at said land office, and that thereupon in pursuance of said employment, took deeds to said Cobban from said entrymen for said lands, and thereupon said Cobban conveyed the same to defendant.

An examination of the record clearly establishes that upon this issue the Government presented no testimony tending in any way to support the allegations of the bill. The contract referred to as of date May 22, 1899, alleged to have been entered into between Griswold and Cobban was never introduced in evidence before the court. Copies of this contract were introduced in evidence over the objection of defendant, and not until

the last day of the trial and at the conclusion of all of the evidence in the case, was any effort made to secure the original contract. Thereupon an attempt was made to introduce this contract and to procure the production of the original by means of subpoena *duces tecum*. The original, however, was not produced and was not before the court. The copies which had been introduced in evidence over objection were used by the court in arriving at its decision and were considered by him according to the certificate made by the court. (Rec. Vol. Pl. & Ind. p. 142.) It is, however, submitted that that contract was never properly in evidence nor properly before the court for its consideration. This contract, a copy of which is found in the record, volume "Pleadings and Index," at page 216, entered into on the 22nd day of May, 1899, between R. M. Cobband and C. L. Griswold, is an agreement between Cobban and Griswold by which Griswold was to examine timber lands in the counties of Missoula and Deer Lodge, and to work to the best of his ability in securing options upon desirable timber lands; the lands that were or had been entered under forest reserve scrip, or had been patented, were to be examined, and if desirable, purchased; and it is further specified that the said Griswold is:

> "To find location of timber on surveyed lands which are open for location under the Timber and Stone Act and that will justify the location thereof at the present time" and
>
> "In the matter of location under the Timber and

Stone Act, the commission is to be paid when the Receiver's receipt is issued and the land properly transferred to the first party or his assigns. This where the location has been made by parties furnished by second party (Griswold). But where the locations are accepted and filed on by parties sent by the first party (Cobban), then the commission to be paid as soon as an estimate can be reasonably made, not exceeding thirty days. But such amount to be returned to first party (Cobban) in case the entry shall be contested and lost, on the ground that it was not subject to entry under the Timber and Stone Act." (Rec. Vol. Pl. & Ind., pp. 216 to 218.)

Under the terms of this contract Griswold is employed upon a commission to examine lands that have a sufficient amount of timber on them to justify their purchase; that if the lands are found to be of the character desired Griswold is to report them to Cobban, with the boundaries and Government subdivisions thereof; the commission to be paid after the final receipt has been issued by the land office and the property transferred to said Cobban.

There is in the record not one word of testimony tending to show that in this transaction Cobban acted as the employe or agent of the defendant W. A. Clark. There is no evidence showing or tending to show that the contract entered into between Cobban and Griswold was for the purpose of obtaining lands from the United States in such manner and under such circumstances that it could only be carried out and accomplished by false and fraudulent statements and testi-

mony. The only evidence bearing upon the subject at all is the testimony of Griswold, whose evidence is entirely and utterly unworthy of belief. Griswold, in the affidavit which he made (defendant's exhibit "E"), expressly sets forth:

> "That he has no knowledge of any acts done or authorized by said Robert M. Cobban in the procurement of title to lands taken by parties under the Timber and Stone Act of Congress which were in violation of said acts or in violation of any law of the United States relative to the acquiring of title to lands, and that the instructions of said Cobban to this affiant while in his employ were always to the effect that no contracts for the purchase of timber and stone claims should in any case be made prior to final proof thereon in the United States Land Office." (Rec. Vol. Pl. & Ind., p 317.)

R. M. Cobban himself testifies that he never procured any one or made any arrangement with any one to enter lands for him or in his behalf, and further that he never authorized Griswold to furnish any one money to enter land and to agree to pay them $100 for the land upon the issuance of final receipt, or any other sum whatever. (Rec. Vol. 10, p. 5134.) Cobban further says that he authorized and instructed Griswold to loan money to entrymen and entrywomen, the loan to be secured by mortgage on the land after the issuance of final receipt, and to draw ten per cent. interest. (Rec. Vol. 19, p. 5135.) He further says that he instructed Griswold never in any way to indicate or promise that the lands should be purchased after the issuance of

final receipt. (Rec. Vol. 10, p. 5136.) That he instructed Griswold to purchase only lands that had been taken up with scrip or after final proof had been made and final receipt issued at the land office. That he bought patented lands and scrip lands and lands that were held under Receiver's final receipt, but never at any time did he purchase lands or agree to purchase lands before entry. He further says that he never authorized Griswold to buy any claims for him prior to entry at the land office. (Rec. Vol. 10, p. 5162.) And in this connection Cobban testifies that part of Griswold's duties were to find and report on timber claims; if he wished to place scrip on it he could do so; if Cobban had a party that would take up the land he would send them to Griswold and he was to show them the land; that of all the 79 entrymen and entrywomen that took up land and whose names are set forth in the complainant's bill, nine only had any information whatever from Cobban relative to the land. (Rec. Vol. 10, pp. 5215, 5216, 5217, 5218 and 5219.) Cobban further says:

> "I gave these people that I sent there information as to where they could get land." (Rec Vol. 10, p. 5224.)

He also says that Jemison was given particular instructions that he should in no way give these people to understand that "we would buy the claims; there was to be no intimation and no talk of any purchase of the claims by us prior to final proof and issuance of final receipt." (Rec. Vol. 11, p. 5349.) "There was

no person that was under any obligations to convey their claim to me and I expressly had that understood." (Rec. Vol. 11, p. 5250.) "Some of the entrymen or entrywomen borrowed money of me to prove up their claims. After final receipt they were at liberty to do whatever they pleased with them. To hold them or sell them except that they must secure me for the money I had loaned them and provide for a reasonable rate of interest." (Rec. Vol. 11, p. 5354.)

Cobban further says "there was no talk or agreement or understanding with Griswold in any way that any act should be done or performed that would be in violation of any law of the United States, and I expressly directed and instructed him that there was to be no agreement or talk or contract by which these claims were to be taken up for my use or benefit, and this instruction that I gave him was at the very beginning of the proceedings." (Rec. Vol. 13, p. 6384.)

It is further in evidence throughout the record that not a single one of the entrymen or entrywomen entered these lands for the use or benefit of Cobban. They each and all testified that they entered them for their own use and benefit, without any contract or agreement by which they were to be conveyed to Cobban, and that at no time did they contemplate violating the law of the United States, of which they each and all were fully informed. It is in evidence and is a fact that some of the entrymen and entrywomen were without any large amount of money in hand; that they were

compelled, in order to take advantage of their rights, under the Timber and Stone Act, to borrow money in order to pay the land office fees, the expenses of their witnesses and the Government price for the land; but the fact that they were poor and needy is not any ground upon which the Government can found the allegations made in its bill; nor is the fact that they borrowed money to make these entries proof entitled to any weight as tending to establish the allegations of the bill that these lands were taken up by false and fraudulent statements and false and fraudulent proofs, for the benefit of Cobban or of the defendant in this case.

It is, therefore, clear that in view of the testimony above referred to, and which is in substantial accord with all of the testimony in the case, that the contract referred to between Cobban and Griswold did not in any way tend to warrant the statement of the bill that the lands taken up by the entrymen and entrywomen and by whom money was borrowed from Cobban, in order to pay the costs and expenses thereof, were taken up by means of false and fraudulent statements, and false and fraudulent proofs.

There is no evidence in the record showing or tending to show that the lands entered through the means and instrumentality of Griswold, acting under his contract of May 22, 1899, were for the use and benefit of the defendant W. A. Clark. There is not anywhere to be found in the record the statement of a single witness to the effect that this land or any land was taken up

for the use or benefit of the defendant. On the other hand, the evidence is overwhelming on the part of each and every entryman and entrywoman that the land was taken up for his or her exclusive use and benefit, and for the use and benefit of no other person whatever. The testimony even of Griswold does not in any way establish or tend to establish any connection whatever with the defendant in this case, and although Griswold freely admits that he committed perjury as a witness before the land office for certain entrymen and entrywomen, of which we shall speak hereafter, he does not claim that the defendant W. A. Clark had any interest or connection whatever with any of the entries. Griswold says in his testimony that about the 1st of September, 1899, Cobban told him not to make any agreements whatever further than that he would loan money to the entrymen and entrywomen to make their application to purchase and to make their final proof, but that there was to be no understanding or agreement as to subsequent sale to Cobban. (Rec. Vol. 1, p. 259.) It is established clearly, however, by the testimony of Cobban that this direction to Griswold was at the time of the contract between Cobban and Griswold above referred to. Cobban says upon the point as to when he told him:

> "'Well, sir, he first went to work for me, when he first went to work for us, and at numerous times thereafter. It was well understood and there was no doubt on that score that he knew thoroughly that it was my instructions at all times." (Rec. Vol. 10, p. 5136.)

Albert Jemison testifies specifically that he was instructed by Mr. Cobban not to in any way make any bargain or contract with any one binding them to sell their claim to him. (Rec. Vol. 1, p. 510.) The witness further says that so far as his operations were concerned he never undertook to make any bargain or contract with anybody by which they were to agree to convey the lands to Cobban after final proof. (Rec. Vol. 1, p. 510.) Jemison further testifies that he knows as a fact that the money advanced by Cobban to the people who made entries was made as a loan by him. (Rec. Vol. 1, p. 514.) Thomas B. Bryan testified that he obtained money from Mr. Cobban; that it was given to him by Cobban as a loan and that Cobban told him that all he wanted was his money back and ten per cent. interest. (Rec. Vol. 2, pp. 752, 762, 763, 767.) Charles H. Moss testified that Cobban loaned him the money. (Rec. Vol. 3, pp. 1085, 1099.) And in fact each and all of the entrymen and entrywomen who obtained their money from Cobban testified that it was borrowed from him and that there was no one interested in the claim except the particular entryman or entrywoman who made the entry and that it was taken up for his or her own benefit. The witness H. W. McLaughlin, manager of the Western Lumber Company, was instructed by the defendant to buy some timber. He had negotiations with Cobban for the purpose of purchasing timber and timber lands owned by Cobban. The price agreed upon was to be $1.25 per thousand feet standing. The land

was to be examined by estimators and an abstract of title, showing title to the lands in Cobban, was to be submitted; a deed from Cobban and wife to the defendant, with covenants of warranty, submitted to counsel for the defendant, and if the title was reported as satisfactory and the conveyance in due form, then the estimates as to the amount of timber being agreed upon, the purchase was to take place. Nothing was undertaken in the way of purchasing timber upon any land except such as was owned by Cobban, and to which his title was approved by the counsel for the defendant. (Rec. Vol. 6, p. 2682, et seq.) Witness testifies that he relied on the abstracts of title and the deeds. He did not know whether the entrymen and entrywomen had entered the land properly at the land office or not. He had no suspicion that there was anything unusual, that the land had been taken up under the Timber and Stone Act. He relied entirely upon the title shown by the abstracts and by the deeds. (Rec. Vol. 6, pp. 2734, 2735.) He had no knowledge that Griswold was working for Cobban, or that Cobban had any man working for him. (Rec. Vol. 6, p. 2738.) The price, $1.25 per thousand feet standing, was the full market price for the timber at that time. (Rec. Vol. 6, p. 2746.) Cobban informed witness that he had the lands for sale and was willing to sell them, and that he had a title thereto. (Rec. Vol. 6, pp. 2748, 2749.) Witness further testifies that he never made any contract with Cobban to buy lands from him if he would get a title to

them. He further says that Cobban brought the description of the lands that he had to sell; that the description was sent to the estimator to estimate the amount of timber standing thereon. When the report was made, the abstracts and deeds were furnished by Cobban. The final receipt from the land office was always included among the papers sent, to show that final proof had been made and that the title to the land had passed from the Government of the United States. And it was always after final proof had been made and the receipt issued that the lands were examined and estimated. (Rec. Vol. 6, pp. 2748 to 2751.) The papers were then sent to Butte for examination by defendant's counsel. There was never any contract between Clark and Cobban of any nature or description whatever, for the entry of lands or in any other way, except for the purchase of the lands under the circumstances detailed. (Rec. Vol. 6, pp. 2751, 2752.) Witness further says that the contract with reference to any particular tract of land was not made until after the abstract of title and the deeds had been examined. (Rec. Vol. 6, p. 2752.) He further says that Cobban did not under any circumstances nor at any time, act as the agent or representative of the defendant in any capacity whatever. (Rec. Vol. 6, p. 2752.) That there was no contract or agreement between Clark, or any agent of Mr. Clark, that Cobban was to get persons to locate upon lands for the purpose of ultimately deeding the lands to Mr. Clark. (Rec. Vol. 6, p. 2752.) Witness further says

that he had nothing whatever to do with any of the entrymen personally with reference to their entries. (Rec. Vol. 6, p. 2753.) That he made no inquiry as to the financial standing of the entrymen, and would not, if he were to buy a piece of land, inquire of the financial standing of the seller. (Rec. Vol. 6, p. 2753.) That the price mentioned in the deeds was according to the estimates and was the correct value of the timber and was a fair value for the lands. That the deeds gave the actual consideration which was paid for the lands by the defendant to Cobban. (Rec. Vol. 6, pp. 2755, 2756.) That he had never heard at the time the land was purchased any rumors that Mr. Cobban or anybody else had or was illegally obtaining land for the benefit of any one. (Rec. Vol. 6, p. 2757.) The testimony of Walter M. Bickford is that he was the attorney for the defendant, Clark, and secretary of the Western Lumber Company, and personally acted as attorney for the defendant in examining the abstracts of title to ascertain the ownership of the lands described in the bill of complaint and sold by Cobban to the defendant. (Rec. Vol. 7, pp. 3682, 3684.) That he also examined title to other lands in addition to those described in the bill. That he examined the abstracts of title to the lands described in the bill, and with the exception of the land entered by Lepley, approved of them. (Rec. Vol. 7, p. 3685.) That A. H. Wethey was manager of Mr. Clark's business interests in Montana. (Rec. Vol. 7, p. 3685.) He then takes up each abstract of title,

showing the title to each separate parcel of land as entered at the land office; that the land had been duly entered; final proof made; the purchase price paid; the Register's certificate and the Receiver's final receipt issued and delivered; the fact that a deed by Cobban and wife to Clark for said lands had been properly executed, describing the lands correctly; that it contained the requisite covenants of warranty, and specified the consideration paid. That upon an examination of these he became satisfied that the title to the lands in question was in Cobban, and that by the deed from Cobban and wife the title could be and was conveyed to the defendant. (Rec. Vol. 7, p. 3686, et seq.) Witness further testifies that after the abstracts were approved they were delivered to Mr. A. H. Wethey, with the approval of the witness as counsel for the defendant. The deeds from Cobban and wife to Clark were then examined by him, found to be in proper form, containing a correct description, and thereupon the witness wrote a letter, wherein he informed Mr. Wethey that the deeds were in proper form and conveyed the title to the lands to the defendant, Clark. (Rec. Vol. 8, pp. 3699, 3700.) The witness further testifies that there were ten deeds, embracing all the lands mentioned in the bill, together with other lands. (Rec. Vol. 8, p. 3701.) That the abstracts of title were prepared and furnished by the Missoula County Abstract Company, which had charge of the abstracting of the title. That said company was an old and reliable institution,

thoroughly responsible and entitled to have its abstracts considered as correct. (Rec. Vol. 8, p. 3702.) That the witness had no knowledge or notice that there were any informalities in the title or in the entries of the lands. (Rec. Vol. 8, p. 3703.) That witness had no knowledge of any relation existing between Cobban and any of the entrymen as to the entry of the lands, nor was he informed of any state of facts that would in any way cast suspicion upon the entries as made. (Rec. Vol. 8, p. 3703.) Witness further testifies that he was present at negotiations between the defendant, Clark, Mr. Wethey and Mr. Cobban for the sale of the lands in question. That Mr. Cobban there represented and stated that he was the owner of certain timber lands in Missoula and Deer Lodge Counties; that he desired to sell the same; that the prices could be determined, not so much by the acres as by the standing timber at so much per thousand feet. *That Mr. Cobban was not Mr. Clark's agent for any purpose whatever, but was the owner of the lands and desired to sell them for a certain price, which price was to be agreed upon between the parties.* (Rec. Vol. 8, p. 3704.) Witness, Samuel Dinsmore, testifies that he was a member of the firm of Cobban & Dinsmore, and that his firm was instrumental in purchasing timber lands and subsequently selling the same to the defendant. That there was no arrangement with Griswold or any one else with reference to the acquisition of timber lands on the Blackfoot River, nor was any arrange-

ment made with parties who had or were to make entries on timber lands for the benefit of the firm or any member thereof. (Rec. Vol. 9, p. 4318.) That instructions were given by Cobban to Griswold to buy timber lands that were a good buy with a good title, but not to enter into any negotiations whatever to have the same entered for the benefit of the said Cobban or any one else. (Rec. Vol. 9, p. 4320.) Witness further says:

> *"I know that Mr. Cobban was not the agent of Mr. Clark or any one else."* (Rec. Vol 9, p. 4332.) "I know that the money to buy this timber land did not come from Senator Clark. *I helped to borrow the money to pay for some of it and it did not come from Clark."* (Rec. Vol. 9, p. 4332.) "I know that every sale was a straight deal." (Rec. Vol. 9, p. 433.) "The sales to Clark were straight bona fide sales; the money paid at the times the deeds were delivered." (Rec. Vol. 9, p.4339.) "We never entered into a contract with Clark to furnish him with any amount of timber whatever." (Rec. Vol. 9, p. 4345.) "We expected to sell it to whoever would purchase." (Rec. Vol. 9, p. 4345.) "We tried to sell the land to other parties before we did to Senator Clark." (Rec. Vol. 9, p. 4373.)

The witness further details the different banks in Missoula and Butte in which they borrowed money to buy the land. This is more specifically covered by the testimony of Cobban hereafter referred to. (Rec. Vol. 9, pp. 4334 to 4337.)

The testimony of A. H. Wethey is that he was general manager for Senator Clark since 1888, and is famil-

iar with the transaction by which the timber lands described in the bill of complaint and others were purchased from Mr. Cobban. (Rec. Vol. 9, p. 4386.) That they did not buy any of the land offered by Cobban until abstracts had been submitted and approved by Mr. Bickford, the counsel, showing that the title to the land was in Cobban. (Rec. Vol. 9, p. 4387.) As to the first deed submitted, dated July 29, 1899, before the purchase was made, the deed executed and the payment made therefor, the abstract had been examined, reported on by counsel and approved. (Rec. Vol. 9, p. 4387.) Witness further says:

> "I did not talk with Cobban until after the purchase had been made." (Rec. Vol. 9, p. 4387.)

Warranty deeds were furnished for the land by Cobban and wife. (Rec. Vol. 9, p. 4388.) No payments were made for the land until abstracts had been approved. (Rec. Vol. 9, p. 4388.)

> "We were advised that the title rested in Mr. Cobban." (Rec. Vol. 9, p. 4389.)

> "I drew the checks to pay for the land." (Rec. Vol. 9, p. 4390.)

> "Paid for the first deed, July 29, 1899, in cash; and had no knowledge with reference to the manner in which the land had been acquired from the United States." (Rec. Vol. 9, p. 4391.)

> *"There were no business relations between Mr. Cobban and Senator Clark; Cobban was not the agent of Senator Clark for any purpose whatever."* (Rec. Vol. 9, p. 4395.) ("There was no contract or

agreement between Senator Clark and Mr. Cobban to purchase lands from the United States." (Rec. Vol. 9, p. 4395.)

"Each and all of these sales were out and out sales complete in themselves." (Rec. Vol. 9, p. 4395.)

"The price was $1.25 per thousand feet of timber, standing." (Rec. Vol. 9, p. 4396.)

Each deal was complete in itself; there was no contract or agreement with reference to any other land whatever than that specified and covered by the particular deed and by the particular transaction itself. (Rec. Vol. 9, p. 4400.)

"I should know if there was any agreement between Senator Clark and Mr. Cobban because it is within the scope of my employment to know concerning all these matters with reference to this particular transaction concerning the lands purchased by Senator Clark from Mr. Cobban." (Rec. Vol. 9, p. 4401.)

There is also introduced in evidence a letter from Senator Clark to Mr. Wethey, of date October 10, 1899, in which he says that they have all the timber that they desire on hand, and does not care to purchase any more. (Rec. Vol. 9, p. 4406.) In a letter dated October 12, 1899, Senator Clark stated that he had decided not to purchase any more timber from Cobban. (Rec. Vol. 9, p. 4409.)

On October 13, 1899, there was a proposition from Cobban to Clark to borrow seventy-five cents per thousand feet standing timber at ten per cent. interest with

an option to Clark to purchase at any time within four months if he so elected, and if he did purchase to pay the balance of fifty cents per thousand standing timber, and if he did not desire to purchase the loan was to be repaid with interest. (Rec. Vol. 9, p. 4413.) There is also introduced in evidence a letter from Mr. Wethey to Cobban agreeing to make the loan upon the terms stated. (Rec. Vol. 9, 4416.) And a letter from Clark to Wethey agreeing to make the loan as requested. (Rec. Vol. 9, p. 4418.) There is a letter also from Clark to Wethey of date November 18, 1899, agreeing to take the land of Cobban and receive the deed upon his agreeing to make a discount of five per cent. on the purchase price of $1.25 per thousand feet standing timber. (Rec. Vol. 9, pp. 4420, 4429.) There is also a note of Cobban for the amount of money borrowed, introduced in evidence, cancelled. (Rec. Vol. 9, pp. 4421, 4424, 4425.) There is also a $10,000 note to the bank of W. A. Clark and Brother, taken up by defendant Clark as part of the purchase price for the lands purchased by Clark from Cobban. (Rec. Vol. 9, p. 4427.) There is also a letter from Clark to Wethey, January 22, 1900, that he does not wish to purchase the land and desires the payment of the loan. (Rec. Vol. 9, p. 4430.) Defendant's Exhibit 289, January 27, 1900, is an agreement from Clark to Cobban to reconvey the land to Cobban on payment of the loan. (Rec. Vol. 9, pp. 4432 to 4434.)

Witness then testifies that Clark bought the timber

and the land and paid the fifty cents per thousand feet standing timber (contract and draft, defendant's exhibit 290 and 291, date November 18, 1899). (Rec. Vol. 9, pp. 4436, 4440.)

Witness further testifies that the deal was closed by payment of fifty cents per thousand feet standing timber, less five per cent. (Rec. Vol. 9, p. 4441.) There is also a letter from Bickford approving of the title as shown by the abstract. (Rec. Vol. 9, p. 4454.) In a letter found in Vol. 9, page 4464, Bickford called attention to a mortgage from L. A. Wells and Lizzie Wells to the Big Blackfoot Milling Company which is still unsatisfied of record.

Witness further testifies that after each deal was closed as shown by the separate deeds introduced in evidence there were no arrangements for the further sale of timber, but each deal was separate and distinct and that when Cobban subsequently sold further timber, as he did, was upon a new and distinct agreement, sometimes being sold outright and sometimes on the basis of a loan, as above set forth, and an option to purchase and the subsequent taking up of the option and the payment of the money. There is a letter from Wethey to Clark, of date November 14, 1899, which sets forth the whole deal by which the land was acquired from Cobban, first a loan being made upon it with an option and then subsequently upon the payment of the purchase price agreed, with a discount of five per cent., and the delivery of the deeds and the

closing of the transaction. (Rec. Vol. 9, pp. 4575, 4576.)

The testimony of Bernard Noon is that he was business manager for the Largey estate and had purchased timber for the estate in the Bitter Root Valley from Cobban in 1900. That Cobban wanted to sell timber on the Blackfoot, but that the Largey estate did nothing in the matter, because they were not satisfied with the price Cobban asked. Cobban also tried to sell to the Big Blackfoot Milling Company, to J. T. Carroll, and to Mr. Clark. That he evidently desired to sell the land for the best price possible and was making efforts to that end among dealers in timber. (Rec. Vol. 9, pp. 4678, 4679, 4680.)

John B. Catlin testified that he was a land attorney practicing before the land office; that he was engaged in taking care of entries before the land office under the Timber and Stone Act; that he acted as attorney for numerous entrymen and entrywomen in taking up land, and that he paid the purchase price into the land office for his clients usually and frequently, in almost all instances; and the final receipt was mailed to him from the land office, that being the usual practice. (Rec. Vol. 9, pp. 4697, 4698.) That he arranged at times to borrow the money to pay for the land, acting for his clients in that matter at their request. (Rec. Vol. 9, p. 4700.) That Mr. Cobban had nothing to do with the entries made except when the parties applied for a loan to make final proof. That there was no con-

tract to go upon the lands and take them up for the benefit of Mr. Cobban or any one else, and no contract on the part of any of the entrymen or entrywomen to convey the lands or any part of them to Mr. Cobban or any other person after final proof. (Rec. Vol. 9, p. 4701.) That the money was loaned by Cobban & Dinsmore to many people in various occupations; that they were in the loaning business, and it was not restricted to people entering land under the Timber and Stone Act, but to all kinds and classes of people in that vicinity, their business being real estate and loans. (Rec. Vol. 9, p. 4702.)

That there was no contract between Clark and Cobban to procure people to take up timber lands; no agreement of that kind whatever. (Rec. Vol. 9, p. 4702.)

That Cobban and Dinsmore were trying to sell the timber lands which they had purchased to other people than to Clark; that they attempted to sell to J. T. Carroll, to the Blackfoot Milling Company and to others. (Rec. Vol. 9, p. 4703.) That Cobban made trips to the East to see if he could not find a purchaser for the timber that he had bought. (Rec. Vol. 9, pp. 4704, 4705.) Cobban instructed Griswold to make no contract or agreement of any kind for the conveyance of the land looking towards securing a title to the land for Cobban prior to the issuance of final receipt. (Rec. Vol. 9, p. 4707.)

That to the knowledge of the witness Cobban told people frequently and without exception that he would

not buy or agree to buy any timber land when they came in and offered to take up lands and sell to him after final proof. (Rec. Vol. 9, p. 4707.) Witness further says that it has been the custom from his experience with the land office for entrymen to borrow money in order to enter land at the land office to pay their expenses and costs thereof.

Defendant, W. A. Clark, testifies *that he has known Cobban for eight or ten years; that Cobban was never his agent for any purpose; that he knew nothing whatever of Cobban's contract with Griswold or that he ever had a contract with Griswold.* (Rec. Vol. 10, p. 5099.) He knew nothing of the manner in which Cobban obtained title to the lands from the United States. (Rec. Vol. 10, p. 5100.)

> "I purchased the land from Cobban. Mr. Wethey called my attention to the matter." (Rec. Vol. 10, p. 5101.)

> "Cobban said he owned the lands; abstracts of title were submitted, and my instructions to Mr. Wethey were that written abstracts of title showing the title in Cobban to be perfect must be furnished and not to purchase the lands otherwise." (Rec. Vol. 10, p. 5101.)

> "With regard to the deeds November 11 and 13, 1899, the money was loaned to Mr. Cobban, seventy-five cents per thousand feet, standing timber, with an option to purchase for four months, upon the payment of fifty cents per thousand feet, standing timber, additional, if I elected to purchase." (Rec. Vol. 10, p. 5104.) "Cobban stated that he wished to use the money in order to purchase the

Higgins Block in Missoula." (Rec. Vol. 10, p. 5109.)

Witness further testifies that he never had any acquaintance with any of the entrymen; never employed them or authorized any one to employ them to make entries for him, either directly or indirectly. (Rec. Vol. 10, p. 5109.)

Witness is asked:

"Q. Did you ever have any connection or acquaintance with any of the entrymen or entrywomen who entered lands under the Timber and Stone Act?

"A. None whatever.

"Q. What have you to say with reference to having either employed men yourself or authorized anybody else to employ men for you for the purpose of entering lands under the Timber and Stone Act?

"A. I never employed any one for any such purpose.

"Q. Did you ever authorize anybody to do it?

"A. I never authorized anybody to do it.

"Q. What have you to say as to having any contract or agreement with any one to do it?

"A. Never in my life made any such contract with any one or authorized any one to make it for me.

"Q. Did you ever hear of any contract of that kind being made?

"A. I never heard of any being made.

"Q. What have you to say with reference to your knowledge of the manner of acquiring title

to land you purchased prior to the time when actual proof was made?

"A. I had no knowledge as to the manner of the acquiring of title to land." (Rec. Vol 10, pp. 5109, 5110.)

The witness R. M. Cobban testifies that he was in the real estate business; that he purchased timber on the Blackfoot and Missoula Rivers, and in Oregon; that he was not the agent of the defendant Clark; did not act as such; and never claimed to so act. (Rec. Vol. 10, p. 5132.) That he never as the agent of Clark entered into a contract with Griswold. (Rec. Vol. 10, p. 5132.) That he never hired people to enter lands under the Timber and Stone Act nor paid their expenses in any manner as the agent of W. A. Clark. (Rec. Vol. 10, p. 5133.) Witness further testifies that he loaned money to a number of people to pay their expenses and the cost of entering land. (Rec. Vol. 10, p. 5134.)

"I never spoke to Clark about purchasing timber lands until I had acquired the lands on the Blackfoot." (Rec. Vol. 10, p. 5144.)

"I spoke to McLaughlin first. I did not offer to sell any land that I did not have title to except scrip land." (Rec. Vol. 10, p. 5145.)

"I sold certain lands to Clark; saw him in his office; later took the matter up and the business was conducted with Bickford, Wethey and McLaughlin."

Witness also refers to exhibits 293, 276, 277. (Rec. Vol. 10, pp. 5146, 5147.) Mr. Bickford examined the titles and purchased the lands only when the titles were

satisfactory as shown by the abstract. (Rec. Vol. 10, p. 5147.) "There was nothing ever said as to the source of title in my talk with Mr. Clark." (Rec. Vol. 10, p. 5148.)

> "Neither Clark, Wethey nor Bickford knew anything about the facts, how the titles were acquired by me except as shown by the abstract." (Rec. Vol. 10, p. 5148.)
>
> *"I had title to all the land I sold Mr. Clark. The money was actually paid; the sales were bona fide and complete."* (Rec. Vol. 10, p. 5150.)
>
> "The transactions in November were upon the basis of a loan and option." (Rec. Vol. 10, pp. 5151, 5152.)

The witness then details that he borrowed money for the purpose of making purchases of timber lands from the First National Bank of Butte, First National Bank of Missoula, Silver Bow National Bank of Butte, State Savings Bank of Butte, S. V. Kemper, James McKinnon, of Chippewa Falls, Wisconsin; S. C. F. Cobban and W. A. Clark and Brother; that he put a few thousand dollars of his own into the purchase. (Rec. Vol. 10, p. 5154.) The notes that he gave to the First National Bank of Butte were introduced in evidence, exhibits 316 to 330. (Rec. Vol. 10, p. 5155.) Notes to the First National Bank in Missoula, exhibits 331 to 336; notes to the State Savings Bank, exhibits 338 to 339; note to the Silver Bow National Bank, exhibit 337; note to James R. McKinnon, exhibit 340; note to S. C. F. Cobban, exhibit 341; notes to Joseph Boors,

exhibits 342, 343; note to W. A. Clark and Brother (Rec. Vol. 10, pp.. 5155 to 5159.)

> *"I never received a dollar from W. A. Clark for the purpose of procuring land to be transferred to him."* (Rec. Vol. 10, p. 5159.)
>
> "After I acquired title to the lands I tried to sell, to the Big Blackfoot Milling Company, Wm. Kendall, Heinze, and in the East, the lands I afterwards sold to W. A. Clark." (Rec. Vol. 10, p. 5160.)
>
> "I sold lands to the Largey Lumber Company." (Rec. Vol. 10, p. 5161.)
>
> *"I acquired title to all the lands mentioned in the complaint before offering to sell them."* (Rec. Vol. 10, p. 5162.)

The testimony of E. B. Weirick, cashier of the First National Bank of Butte, is that he loaned money to Cobban to purchase timber land. (Rec. Vol. 12, pp. 6045, 6046.) The testimony of Andrew J. Davis is to the same effect. (Rec. Vol. 12, pp. 6071 to 6073.) That he knows that Cobban tried to sell the timber lands that he purchased to Wisconsin people, to the Largey Estate, Carroll Lumber Company and to the Big Blackfoot Milling Company. (Rec. Vol. 12, pp. 6074, 6075.) There were further introduced in evidence warranty deeds from the entrymen and entrywomen to Cobban, abstracts deraigning the title from the Government; and the warranty deeds from Cobban and wife to Clark.

The foregoing testimony is uncontradicted directly

or inferentially by any witness, and it is proven beyond doubt that the defendant was not directly or indirectly instrumental in having any of the lands entered by the entrymen or entrywomen. That Cobban was not the agent or representative of the defendant in any respect and that the contract between Griswold and Cobban referred to was something of which the defendant had no knowledge whatever, was not concerned in and had no means of knowledge, and that no entry was made by any person of the lands in pursuance of any contract whatever entered into between Cobban and Griswold on behalf of the defendant.

There is no testimony showing or tending to show that John B. Catlin was associated with Griswold and Cobban for the purpose of entering lands or procuring lands to be entered for the benefit of Cobban or any other person. It appears from the testimony of the witnesses Bickford, Hershey and Marshall that John B. Catlin is an honored and esteemed citizen of Missoula County; that he had been Register of the land office, Indian agent, was an old soldier, a veteran of the war, and a gentleman whose standing in the community in which he lived was high, and whose reputation for business integrity was of the best. (Rec. Vol. 2, pp. 965 to 968.) Catlin himself testifies:

> "I did not associate myself with Mr. Cobban for the purposes set forth in the bill of complaint in any manner whatever; I was employed by them a long time before. The statement of the complaint

that I associated myself with them or was associated with them, and that in pursuance of such association we examined lands, procured various persons for hire to enter the same at the United States Land Office, paid their expenses, the expenses of their witnesses, the land office fees, and the price therefor at the said land office, and that thereupon in pursuance of such employment, took deeds to said Cobban from said entrymen for said land and that thereupon said Cobban conveyed the same to defendant, is wholly false." (Rec. Vol. 10, p. 4854.)

Cobban himself says:

"I never associated Catlin with me to acquire lands with Griswold for Clark or in any other manner whatever." (Rec. Vol. 10, p. 5113.)

And he further states that the allegations of the bill of complaint that in the conduct of such business he procured various persons of both sexes for hire to enter lands under the Timber and Stone Act; that he in company with Griswold and Catlin paid their expenses and those of their witnesses and paid the price of acquiring the land at the proper land office, was absolutely false and had no foundation in fact whatever. (Rec. Vol. 10, p. 5133.)

This evidence is uncontradicted by any testimony whatever on the part of the Government, and the allegation of the bill as to the association of John B. Catlin with Cobban and Griswold for the unlawful purposes specified therein is entirely without support in the testimony.

There is no testimony to sustain the allegation of the bill that the entrymen and entrywomen who entered the lands described in the complaint did so for hire or under contract of sale.

The testimony of the witness Levi B. Cyr is that he took up a timber claim; that he visited the land, went upon it and he testifies as follows:

> "Q. Well, now, are you pretty sure that Mr. Jemison did not hire you to prove up on this claim for Mr. Cobban?
>
> "A. Yes, I am very sure about that.
>
> "Q. Nor Mr. Kilburn?
>
> "A. No, sir.
>
> "Q. Nor Mr. Cobban himself?
>
> "A. No, sir.
>
> "Q. Nor Mr. Catlin?
>
> "A. No, sir.
>
> "Q. In fact nobody else employed you to take it up for anybody?
>
> "A. No, sir, the time I went to look for that claim I didn't know what I would take up; didn't know whether I would take up a claim or not; I just wanted to see what I could get for myself; I didn't think Mr. Cobban knew I was up there.
>
> "Q. You took it up you say with a view to acquiring title to it and cutting off the logs yourself and putting them in the stream?
>
> "A. Yes, sir." (Rec. Vol. 5, p. 2120.)

The witness further testifies:

> "Q. Well, now, it appears Mr. Cyr, that after you had made this filing and when you came to

prove up that you borrowed the money to make the proof of Mr. Cobban?

"A. Yes, sir. I asked Mr. Cobban to make me a loan.

"Q. At the time you made your filing on the land, where did you contemplate getting the money with which to pay for it?

"A. Well, at the time I made the filing I knew I could raise the money to enter it, and if I didn't get it from Mr. Cobban I knew that I could have got it from my folks." (Rec. Vol. 5, p. 2123.)

The testimony further shows:

"Q. Now, it appears that at the time you filed on the land, Mr. Cyr, that you made an affidavit to this effect: 'I do not apply to purchase the land above described on speculation but in good faith to appropriate it to my own exclusive use and benefit, and that I have not directly or indirectly made any agreement or contract or in any way or manner with any person or persons by which the title I might acquire from the Government of the United States might inure in whole or in part to the benefit of any person except myself.' Was that true?

"A. Yes, sir.

"Q. Then, when you came to make your final proof, you were asked the question: 'Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract in any way or manner with any person whomsoever by which the title which you might acquire from the Government of the United States may inure in whole or in part to the benefit of any person except yourself?' Is that correct?

"A. Yes, sir.

"Q. That was true, was it not?

"A. Yes, sir.

"Q. Then you were asked the following question: 'Do you make this entry in good faith for the appropriation of the land exclusively to your own use and not for the use or benefit of any other person?' to which you answered 'Yes.' Was that true?

"A. That is true.

"Q. Then you were asked the following question: 'Has any other person than yourself, or has any firm or corporation or association any interest in the entry you are now making or in the land or in the timber thereon?' to which you replied, 'No, sir.' Was that true?

"A. Yes, sir." (Rec. Vol. 5, pp. 2127 to 2128.)

The testimony of the witness Cyr, as given above, is in substance and reality the testimony of each and every entryman and entrywoman who was called to testify in the case, being all or nearly all of the entrymen and entrywomen named in the bill of complaint, and covering all of the lands specified therein.

The witness Albert Jemison testified that he was a witness for certain entrymen and entrywomen and that he testified correctly and truly when he said that there was no sale or contract whatever as to the entries in which he was a witness. (Rec. Vol. 1, p. 502.) He was asked this question:

"Q. As far as your operations were concerned, you never undertook to make any bargain or contract with anybody by which they were to agree to convey their lands to Mr. Cobban?"

"A. No, sir." (Rec. Vol. 1, p. 510.)

Albert Jemison further testifies that he did not enter the claim which he took up for hire, and his testimony is substantially the same as that of witness Cyr, above referred to. (Rec. Vol. 1, pp. 486 to 490.)

To the same effect is the testimony of John Murtaugh (Rec. Vol. 2, p. 839), Thomas B. Sperry (Rec. Vol. 2, pp. 879, 870, 885 to 887), Oliver E. Muchmore (Rec. Vol. 2, pp. 895, 896, 899, 902), Albert F. Muchmore (Rec. Vol. 2, pp 1012, 1014, 1015), Charles H. Moss (Rec. Vol. 3, pp. 1092, 1093), Elijah W. Hoyt (Rec. Vol. 3, pp. 1101 to 1104, 1122), Charles H. Jemison (Rec. Vol. 3, p. 1133), Frank B. Arey (Rec. Vol. 3, p. 1141), Jacob F. Jemison (Rec. Vol. 3, p. 1157), Lelia T. Bryan (Rec. Vol. 3, p. 1148), Guy W. Muchmore (Rec. Vol. 3, pp. 1170, 1171), James Mize (Rec. Vol. 3, p. 1187), Herbert Eddy (Rec. Vol. 3, pp. 1222, 1223), Mary Eddy (Rec. Vol. 3, pp. 1238, 1239), Abraham J. Jemison (Rec. Vol. 3, pp. 1267, 1269), Zora Jemison (Rec. Vol. 3, p. 1287), James W. Wheaton (Rec. Vol. 3, pp. 1301, 1305), Eveline Jemison (Rec. Vol. 3, p. 1321), Charles H. Jemison (Rec. Vol. 3, p. 1133), Harriet F. Bryan (Rec. Vol. 3, pp. 1358, 1359, 1360), Cora Dodd (Rec. Vol. 3, pp. 1427, 1429), Hiram Dodd (Rec. Vol. 3, p. 1454), Laura Roll (Rec. Vol. 3, pp. 1500, 1502), Lavina I. Gilman (Rec. Vol. 3, pp. 1526, 1528), Josiah C. Gilman (Rec. Vol. 3, pp. 1546, 1547), Thomas Roll (Rec. Vol. 3, p. 1565), Leonard Barrott (Rec. Vol. 3, pp. 1582, 1583), Edward D.

Doney (Rec. Vol. 4, pp. 1635 to 1639), George Dildine (Rec. Vol. 4, p. 1676), Hannah B. Arey (Rec. Vol. 4, pp. 1687, 1689), Frank B. Chattin (Rec. Vol. 4, pp. 1763, 1765 to 1767, 1792), William J. Eddy (Rec. Vol. 4, pp. 1786 to 1789), M. R. Stairs (Rec. Vol. 4, pp.1793 to 1814), George P. Jemison (Rec. Vol. 4, pp. 1863 to 1868), Mrs. Emma Dildine (Rec. Vol. 4, pp. 1923 to 1930, 1934), Thomas H. McConnell (Rec. Vol. 4, p. 1959), Calvin Yarger (Rec. Vol. 4 ,pp. 2001 to 2006), William E. Lepley (Rec. Vol. 4, p. 2009), J. G. Hendrix (Rec. Vol. 4, pp. 2042 to 2053), Oscar Muchenhirn (Rec. Vol. 5, pp. 2053 to 2060), Martha E. West (Rec. Vol. 5, pp. 2180 to 2184), Lizzie T. Catlin (Rec. Vol. 5, pp. 2202 to 2205), Mrs. Effie M. Tilburn (Rec. Vol. 5, pp. 2244 to 2250), M. T. Dunham (Rec. Vol. 5, pp. 2285 to 2290), Nels Opsata (Rec. Vol. 5, pp. 2351 to 2356), Allen Dodd (Rec. Vol. 5, pp. 2403, 2404, 2419, 2423), Vital Cyr (Rec. Vol. 5, pp. 2664, 2666), A. E. Ehle (Rec. Vol. 6, pp. 2836, 2844, 2845, 2846), Nellie J. Ehle (Rec. Vol. 6, pp. 2898 to 2901), Recy M. Jemison (Rec. Vol. 6, pp. 2990 to 2993), Robert Starkie (Rec. Vol. 6, pp. 3082 to 3087), Mary A. Starkie (Rec. Vol. 6, p. 3113), Elizabeth A. Reeve (Rec. Vol. 6, pp. 3138, 3139, 3141, 3144), John B. Reeve (Rec. Vol. 7, pp. 3236 to 3289), Mrs. Lizzie A. Wells (Rec. Vol. 7, pp. 3291 to 3301), Alfred Stewart (Rec. Vol. 7, pp. 3409, 3410), Louis Jakways (Rec. Vol. 8, pp. 3948, 3949), Joseph B. Seeley (Rec. Vol. 8, pp. 4188, 4189), Ernest R. Kilburn (Rec. Vol. 10,

pp. 4890, 4891), who also testifies as to the entry of his wife, and that there was the same state of facts with reference to her claim as his own (Rec. Vol. 10, pp. 4894, 4895), Marion B. Watson (Rec. Vol. 10, pp. 5012 to 5014), who also gives the same testimony with regard to the entry of his wife and mother. (Rec. Vol. 10, pp. 5014, 5015.) His wife's name is Katie Watson and his mother's name is Harriet Watson. (Rec. Vol. 10, pp. 5025 to 5027 and 5065.) Also, S. C. F. Cobban (Rec. Vol. 12, pp. 6010), Dan McGillis (Rec. Vol. 12, pp. 6128, 6159), Mrs. Jennie Mize (Rec. Vol. 12, p. 6188), Daisy L. Chattin (Rec. Vol. 13, p. 6209), Elizabeth A. Muchmore (Rec. Vol. 13, pp. 6212, 6213), Martha M. J. Doney (Rec. Vol. 13, p. 6229), Mrs. May Hawthorne (Rec. Vol. 13, p. 6250, et seq.)

The evidence, also, of Charles A. Jakways, of the firm of Jakways and Faust, merchants at Ovando, is that there was no relationship or agency between Cobban and themselves concerning the entries of the land whatever, nor was there any agreement between Cobban and themselves by which they were to procure persons to look up claims to transfer to Cobban (Rec. Vol. 8, pp. 4041 and 4042). That Cobban never left any money at their store to be used for paying for entries. (Rec. Vol. 8, p. 4049.) And he further says that as to the entries of Lelia T. Bryan, May Hawthorne, Albert Stewart, Elijah W. Hoyt, Nels Opsata, Doney and wife, and the Muchmores, there was no contract or agreement whatever by which the land was

to be entered for the benefit of Cobban. The witness further says that he never was the representative of Cobban at any time, directly or indirectly. (Rec. Vol. 8, pp. 4119, 4120.)

The testimony of H. J. Faust, of the firm of Jakways and Faust, of Ovando, is that Mr. Cobban had no connection with their firm or any member of it, and they had no agency for him in buying the timber land; that he did not know of any person taking up land under arrangement to transfer the same to Cobban. (Rec. Vol. 11, pp. 5765, 5766.) That there was no arrangement between their firm and Griswold. (Rec. Vol. 11, p. 5764.)

The witness also testifies to the fact that Elijah W. Hoyt and his wife, Charlotte S. Hoyt, borrowed money of their firm to make the entry upon the land taken up by them; that there was no arrangement or agreement that they were to sell or convey the land so taken up. (Rec. Vol. 11, pp. 5767, 5768.)

That Edward J. Doney and Matilda M. J. Doney, his wife, borrowed money from Jakways & Faust to take up their claim; that there was no contract or arrangement to convey to Cobban. (Rec. Vol. 11, pp. 5771, 5772.)

That Guy W. Muchmore, Alfred E. Muchmore and Elizabeth A. Muchmore borrowed money to take up their claims of Jakways & Faust, and gave their note, which was surrendered when the note was paid;

that there was no contract or agreement to transfer their title to Cobban. (Rec. Vol. 11, pp. 5773 to 5776.)

That Alfred Stewart and Nels Opsata borrowed the money of Jakways & Faust to take up their land; that there was no contract or agreement to convey to Cobban on their part. (Rec. Vol. 11, pp. 5779 to 5781.)

That Jakways & Faust also loaned the money to Louis Jakways and Cora Y. Faust to take up their land, and also to Mrs. May Hawthorne; that there was no contract or agreement to convey. (Rec. Vol. 11, pp. 5781, 5782.)

Each and all of these witnesses have sworn positively that they were not hired to enter the land; that they entered the lands for themselves, for their own use and benefit, and that there was no contract or agreement by which they were to convey the same to any person or persons whomsoever. This testimony is undisputed; most of it is given by the Government's own witnesses.

Therefore, it is clear that so far as the fourth issue above specified is concerned, the Government's case is entirely unsupported by any competent evidence.

FOURTH.

There is no evidence on the part of the Government establishing or tending to establish that these Deeds and Patents were obtained and procured by said Cobban for the defendant's use.

This is clearly shown by reference to the testimony quoted and cited under the previous issue, to which we respectfully refer, it being clear in this connection that there was no contract or agreement between the defendant and Cobban to have the lands entered; that Cobban procured the title from the entrymen who entered the lands for themselves alone; that there was no contract or agreement between Cobban and the entrymen and entrywomen, and that the allegations of the bill that there was any specific agreement or any implied agreement on the part of the defendant to have the lands entered, or that the lands were entered for the defendant's use in any way, is entirely without support in the evidence and is a voluntary charge, which falls by reason of the fact that there is no evidence to support it.

FIFTH.

The entire case of the Government rests upon the testimony of Chauncey L. Griswold. Therefore, it was necessary that the witness Griswold should be a credible witness and his testimony entitled to belief.

Of the witness Griswold, this much can be said: That his testimony is unworthy of belief wherever that testimony is contradicted or questioned by any other witness. There is no witness that has appeared in this case whose testimony is entitled to so little weight as that of Chauncey L. Griswold. He entered into a contract with Cobban to examine timber lands upon a commis-

sion of five per cent. After a time he brought a suit against Cobban to recover a balance alleged to be due. His attorney, one Draffen, announced that he was a personal friend and former schoolmate of one Zevely, a Government agent; that he had made specific charges against Cobban to the Government agent with reference to the entry of timber lands, and that the object was to force Cobban by that means to pay Griswold the price he demanded. Griswold himself stated that he intended to disclose to the Government a state of facts that would get Cobban into trouble, unless he was settled with satisfactorily. He did make an affidavit for the Government agent. Subsequently, a settlement was arrived at between Cobban and Griswold.

Thereupon he makes an affidavit in which he says that he has no knowledge of any fact or circumstances in the entry of any of the timber lands, tending to show in any manner that Cobban or any of the entrymen or entrywomen had been guilty of violating the law of the United States. Thereupon he goes upon the witness stand in this case on behalf of the Government. It appears that he has been a witness on the final proof of certain entrymen and entrywomen.

He boldly avows the fact that he committed perjury in numerous cases; that he wilfully and deliberately committed perjury for the purpose of getting twenty-five dollars that was coming to him under his agreement with Cobban. When confronted with his affidavit made upon a settlement with Cobban, he denied

that he read the affidavit over. Four or five respectable and creditable witnesses who were present at the time, testified that he not only read the affidavit over, but stated that the affidavit was true and correct, and the contents thereof were true and correct.

He thereupon testifies further with reference to certain entries and with reference to certain conversations and transactions, and in each and every istance his testimony is contradicted flatly by the witnesses who are brought against him.

In every material part of his testimony and upon every single fact he is contradicted,—sometimes by two and three different witnesses to the same state of facts.

It is further in evidence that he has been guilty of larceny; that he is a common thief, stealing things wherever he could lay his hands on them, no matter how small; that he was engaged at one time in a deliberate attempt at blackmail; that he engineered a series of charges against the Anaconda Copper Mining Company and forced them to pay him blackmail to the amount of one thousand dollars.

A large number of eminent and respectable citizens of Missoula County, who are acquainted with his reputation for truth, veracity and honesty, freely and voluntarily testify that his reputation for truth and veracity is bad, and that his reputation for honesty is of the worst; that he is not to be believed under

oath; that he is not to be trusted in any matter requiring integrity and honor.

It is further in evidence that he frequently stated that his object in instituting the proceedings which resulted in the bringing by the Government of this case, was for the purpose of procuring a cash settlement from the defendant and from Cobban. It is further in evidence that he was indicted by the grand jury for perjury and subornation of perjury in connection with the timber entries; that the indictment was nollied at the request of the Government, and that the Government had promised him immunity not only from all of the charges upon which he was indicted, but also from any charges that could be brought against him, for his testimony in this case, provided he would testify on behalf of the Government. He stated further that the Government agent had promised him that, if he would assist the prosecution of this case and testify they would furnish him with a permanent position under the Government, provided he was successful in winning the case. That he was receiving additional compensation from those engaged in prosecuting the case for the Government, in addition to the witness fees, and that he had the promise of permanent employment from the Government, depending entirely upon the success of his efforts in the case. It further appeared that he was engaged in endeavoring to color the testimony of witnesses; talked with them; urged them to corroborate his statements, and promised them immunity from

any prosecution, if they would testify on behalf of the Government. That he used the power of the Government, as its representative, to coerce witnesses into making false statements.

He was constantly seated during the progress of the trial at the ear of the prosecuting counsel, advising and encouraging reprehensible questions for the purpose of aiding in any manner in bringing about a result favorable to the Government.

Under these circumstances,—impeached absolutely as to his reputation for truth and veracity; proven to be a common thief; shown to have been guilty of blackmail; confessed to have been actuated in his transactions by avarice and a desire to gain money from the defendant and Cobban; shown to have made threats of injury, for the purpose of forcing a settlement in his own affairs; known and admitted to be the associate and companion of the very dregs and offal of society; a man without credit, without any standing in the community; devoid of honesty, honor and integrity; without one single witness to corroborate his statements or his evidence,—he stands as the blackest perjurer that has ever come into a court of equity. And upon this testimony alone the Government of the United States has seen fit to found a suit in which there has been taken nearly seven thousand pages of testimony, and which occupied the time and attention of the court and its representatives for a period of nearly a year and a half.

It is not necessary to go into detail as to the particulars in which the testimony of Griswold is contradicted by the testimony of other witnesses, except to say that wherever the testimony of Griswold is found to favor the position of the Government, as announced in its bill of complaint, that testimony is repudiated and contradicted by the evidence of other witnesses, credible, unimpeached and unimpeachable, who specially and in detail deny the same.

GRISWOLD'S REPUTATION.

Taking up the testimony of the witnesses as to the character of Griswold, Elijah W. Hoyt, a man of integrity and standing in the community in which he lives, testifies that he is acquainted with the reputation of Chauncey L. Griswold for truth and veracity in the community in which he lives, and that that reputation is bad. (Rec. Vol. 3, pp. 1123, 1124.)

Oscar Muckenhirn testifies that he knows the reputation of Griswold for honesty and integrity, truth and veracity, and that it is very bad. (Rec. Vol. 5, p. 2159.)

Clarence H. Prescott, sheriff of Missoula County, testifies that he knows the reputation of Chauncey L. Griswold for truth, honesty and integrity, and that it isn't very good. (Rec .Vol. 8, p. 3722.)

Charles H. McLeod testifies that he knows the reputation of Griswold in the vicinity in which he lives,

for truth, honesty and integrity, and that that reputation is bad. (Rec. Vol. 8, p. 3776.)

Thomas C. Marshall, a lawyer of Missoula, of the highest standing and professional eminence, testifies that he has known Griswold's reputation for truth, honesty and veracity in the vicinity in which he lives, and that that reputation is bad. (Rec. Vol. 8, p. 3807.)

D. V. Bean testifies that he has known the reputation of Griswold for seven years for truth, honesty and veracity in the vicinity in which he lives, and says as to that reputation:

> "He has none at all. He has no reputation for truth or veracity or anything that is honest on earth. I know it because I have associated with him enough to know that, and every man that has associated with him knows the same thing." (Rec. Vol. 8, p. 3851.)

Louis Jakways testifies that he knows the reputation of Griswold for truth, honesty and integrity in the vicinity in which he lives, and that that reputation is bad. (Rec. Vol. 8, p. 3946.)

William K. Kendall testifies he knows the reputation of Griswold for truth, honesty and integrity in the community in which he lives, and says:

> "I would say that it wasn't very good, that is, what I have heard of it in a general way of speaking; I don't consider it very good myself." (Rec. Vol. 8, p. 3985.)

Robert G. Dixon testifies that he knows the reputa-

tion of Griswold for truth, veracity and honesty in the community in which he lives, and that that reputation is not good. (Rec. Vol. 8, p. 4009.)

Albert F. Matthews testifies that he knows the reputation of Griswold for truth, veracity and honesty, and that that reputation is bad. (Rec. Vol 8, pp. 4028, 4029.)

Charles A. Jakways testifies that he knows the reputation of Griswold for truth, veracity and honesty, and says that, *"He is generally considered crooked."* (Rec. Vol. 8, p. 4062.)

Jasper B. Seeley testifies that he knows Griswold's reputation for truth, veracity and integrity in the community in which he lives, and that that reputation is not very good. (Rec. Vol. 8, p. 4183.)

Samuel Dinsmore testifies that he knows the reputation of Griswold for truth, honesty and integrity in the vicinity in which he lives, and that it is bad. (Rec. Vol. 9, p. 4320.)

H. J. Faust testifies that he knows the reputation of Griswold for truth, honesty and integrity in the community in which he lives, and that his reputation is not good. (Rec. Vol. 12, p. 5929.)

There is no effort or attempt on the part of the Government to rebut or offset this testimony as to the reputation of Griswold for truth, veracity and integrity in the community in which he lives. That this is his

reputation, is uncontradicted in the record, and he is fully and completely impeached.

In the next place, he has impeached himself. He says as to the entry of Harriet Bryan, for whom he was a witness before the land office, that when he testified that he didn't know whether the applicant had directly or indirectly made any agreement or contract in any way or in any manner with any person whomsoever, by which the title which she might acquire from the Government of the United States might inure in whole or in part to the benefit of any person except herself, and to which he answered, "Not to my knowledge," that he had testified falsely. The question is put:

"Did you know at the time you made the answer that it was not true?

"A. I did.

"Q. And you intended wilfully at that time to answer that question falsely?

"A. I did; I had to do it under my contract with Mr. Cobban.

"Q. Did you have any contract with Mr. Cobban by which you were hired to in any manner commit perjury?

"A. No, sir, I did not. * * *

"Q. Is there any clause in that that compels you to go before the land office and commit perjury?

"A. No, sir. It says that I shall secure the land for which I am to receive five cents a thousand for the lumber on it. If I don't secure the land, I am not to get anything. That is, if he don't secure the land.

"Q. And you testified falsely upon the hearing in this matter; in other words, committed perjury, in this case, for the purpose of getting the money on this entry?

"A. By hearsay.

"Q. What do you mean by hearsay?

"A. I said there was an agreement by which this land was to be acquired and transferred to Mr. Cobban.

"Q. And when you said, 'No, I have no knowledge,' you did have knowledge?

"A. Yes, sir, that is, hearsay knowledge." (Rec. Vol. 1, pp. 217, 219.)

Interrogated as to his testimony of the same character in the entry of Albert Jemison:

"Q. Was it true or false?

"A. It was false.

"Q. Did you know at the time you answered thus, that it was false?

"A. I did.

"Q. And you knew that at that time you were committing perjury in making this answer?

"A. *Yes, sir, to a certain extent.* (Rec. Vol. 1, p. 222.)

The witness further says that he took up land in 1895 or in 1894.

"Q. You took up a timber and stone claim, did you?

"A. I did, yes, sir.

"Q. When did you take it up?

"A. I believe in 1894.

"Q. Did you commit perjury when you took that up?

"A. I did, yes, sir; I had to." (Rec. Vol. 1, p. 223.)

Griswold was a witness for Edgar Lehman. He says in regard to his testimony in that case:

"A. Oh, I should say yes, that I answered falsely. * * *

"Q. What was there in this contract that required you to go before the land office and commit perjury?

"A. Dollars and cents." (Rec. Vol. 1, p. 236.)

He further says in regard to that entry:

"Q. So that your perjury in this case was committed for the consideration of twenty-five dollars?

"A. No, sir. * * *

"Q. Now you can answer my question. How much money did you get out of this entry besides twenty-five dollars?

"A. To the best of my recollection, twenty-five dollars.

"Q. No, the question is, how much more than that?

"A. None to the best of my recollection." (Rec. Vol. 1, pp. 238, 239.)

As to the entry of Lelia T. Bryan, for whom Griswold was a witness, he says in regard to his testimony?

"Q. Was that true or false?

"A. False.

"Q. Did you know it at the time?

"A. I did.

"Q. Knew that you had committed perjury when you made that answer?

"A. I did.

"Q. How much did you get for that perjury?

"A. I couldn't say.

"Q. Well, according to your best recollection?

"A. I think in the neighborhood of forty dollars; it might have been more or less; I wouldn't say; I think there were eight hundred thousand feet of lumber on the claim." (Rec. Vol. 1, p. 240.)

As to the entry of Marion B. Watson, for whom he was a witness, he testified as to his testimony there:

"Q. Was that true or false

"A. Yes, sir, it was false.

"Q. Did you know it was false at the time?

"A. I did." (Rec. Vol. 1, p. 254.)

As to the entry of Katie Watson, for whom he was a witness, he testifies as to his evidence before the land office:

"Q. Was it true or false?

"A. It was false." (Rec. Vol. 1, p. 264.)

As to Doc E. Watson, for whom he was a witness at the land office, he testifies as to his evidence before the land office:

"Q. Was that true or false?

"A. The same conditions exactly governed this claim that governed the other two Watson claims.

"Q. Answer the question, please; was it true or false?

"A. It was false.

"Q. Did you know at the time it was false?

"A. I did." (Rec. Vol. 1, pp. 266, 267.)

As to his testimony before the land office in the entry of Thomas McConnell, for whom Griswold was a witness, he testifies as to his evidence before the land office:

"Q. Was that answer true or false?

"A. It was false.

"Q. Did you know at the time it was false?

"A. I did." (Rec. Vol. 1, p. 270.)

As to the entry of Charles Cloutier, he says that his testimony before the land office was false. (Rec. Vol. 1, p. 271.)

As to the entry of John Gillies, for whom he was a witness, he testified that his evidence before the land office was false. (Rec. Vol. 1, pp. 271-272.)

With regard to his testimony before the land office upon the homestead claim of Stephen Tupper, the witness says:

"I will say it was false. I did know he had transferred or made an agreement to transfer.

"Q. That is, you committed perjury on that occasion as well as these others?

"A. I won't deny it." (Rec. Vol. 7, p. 3527.)

These perjuries are all admitted by the witness.

He also made an affidavit, "Defendant's Exhibit E," in which he states as follows:

> "Affiant further states that in truth, and in fact affiant has no knowledge of any acts done or authorized by said Robert M. Cobban in the procurement of title to lands taken by parties under the Timber and Stone Act of Congress which were in violation of said act or in violation of any law of the United States relative to the acquiring of title to lands, and that the instructions of said Cobban to this affiant while in his employ were always to the effect that no contracts for the purchase of timber and stone claims should in any case be made prior to final proof thereon in the United States Land Office." (Rec. Vol. Pl. & Ind., p. 317.)

In regard to this affidavit he says:

> "A. The substance of it was this affidavit was written, and I have no recollection of reading it; I don't think I did. I handed it to my attorneys, Mr. Draffen and Mr. Duncan, and with their approval, I signed it. I have no recollection of reading it; don't think that I did." (Rec. Vol. 1, p. 348.)

He further says:

> "Q. Well, now, do you mean to say that you didn't read over that affidavit?
>
> "A. I have no recollection of reading it over.
>
> "Q. And then it wasn't read over to you?
>
> "A. Not to my recollection.
>
> "Q. Well, you knew perfectly well, what was in it, didn't you?
>
> "A. I did not." (Rec. Vol. 1, pp. 351, 352.)

Thomas C. Marshall testifies that he was present at the time that Griswold signed the affidavit, "Defendant's Exhibit E;" that the affidavit was signed and sworn to by Griswold in his presence. He says:

> "If he read it over I do not recall it, but he stated, without reading the affidavit, what was in it substantially, and particularly with respect to the fact that Cobban always instructed him not to make any contracts; that was the proposition that he reiterated more than once, and reiterated the truth of it, and said that he could consistently make the affidavit because of the fact that it was true." (Rec. Vol. 8, p. 3804.)

Witness Edward B. Howell testifies in regard to this affidavit:

> "Mr. Griswold read that over in my office, in the presence of Mr. Cobban, Mr. Draffen and myself, and said, 'That is true; I am willing to make that affidavit.' Mr. Draffen read the same affidavit, and he took his pencil and struck out all those matters; struck out of that affidavit the reasons why he had informed the Government, and indicated parts that he said Mr. Griswold should not sign. He wasn't willing to let an affidavit be made with those matters in. Then this affidavit was drawn, and Mr. Griswold asserted that he was willing to make this affidavit, and on that occasion, in my office, I stated to him that we didn't want him to sign any affidavit which was not true, and he said, *'That is true; that is all true.'* And from there we went to Colonel Marshall's office." (Rec. Vol. 9, p. 4268.)

Witness further testifies:

> "I said, 'We don't want you to sign anything

which you don't think is true.' Colonel Marshall spoke up, and I remember the form of his phrase; he assented to what I had stated, and said, 'I have never yet knowingly asked a witness to perjure himself, and so help me God, I will not begin.' With that Mr. Griswold asseverated again that it was true, and signed and swore to it before Mr. Stiff." (Rec. Vol. 9, p. 4269.)

Henry C. Stiff testifies in regard to the execution of this affidavit, Defendant's Exhibit E:

"Well, he was sworn and before administering to him the formal oath, after there had been something to indicate that he was ready to swear to it, I propounded to him the question if he knew and was satisfied with the contents of that and desired to swear to it, and he answered yes, and immediately following that I administered to him the formal oath.

"Q. Do you remember any conversation had with reference to the truthfulness of the allegations made in the affidavit outside of the formal conversation between you and Mr. Griswold at the time of administering the oath?

"A. Well, immediately following the occasion when I say that he looked over it as if he were reading it, why he announced that that was the truth, and it was from that that it was manifest that he was ready to sign and swear to it." (Rec. Vol. 12, p. 5943.)

Coming now to the lawsuit between Griswold and Cobban, in which Griswold sued Cobban for $3,500.00 for services rendered in connection with the timber entries, Mr. Draffen was the attorney for Griswold in that suit. Henry C. Stiff, one of the attorneys for Cob-

ban, testifies concerning a statement made by Mr. Draffen in regard to this matter, as follows:

> "He expresed his belief that the demand was a just one and proceeded to tell what he proposed doing in order to secure the allowance of Griswold's demand. He said in that connection that he was a particular friend and old schoolmate of Mr. Zevely, a special agent of the Interior Department, and that he intended writing to him and informing him that there had been a great many unlawful entries under the Timber and Stone Act made, and stated furthermore that Mr. Cobban was connected with the matter and Mr. Griswold represented him, and it was by reason of the relations that existed between them that this controversy arose, and *that he was going to employ that method for the purpose of forcing Mr. Cobban to accede to the demand made by Griswold for the amount that he claimed.* (Rec. Vol. 12, pp. 5940, 5941.)

Thomas B. Bryan testified that Griswold told him that he had committed perjury a number of times in this case, and that he would do it again if necessary to win the case. (Rec. Vol. 2, pp. 813, 814, 816.)

Charles Jemison testifies that Griswold stated to him as follows:

> "Yes, I heard him say he was going to see Mr. Cobban, and I just forget how the conversation came out, and he said if he didn't dig up I will put him behind the bars, and he says, you fells are interested too, and if you don't dig up you are likely to go there yourself." (Rec. Vol. 3, p. 1329.)

John B. Reeve testifies as to what Griswold said:

"The first time I had any talk with him about that, I think it was the first time, he stated to me that he had a case pending against Mr. Cobban for $3,400.00, and if he didn't pay that he had a way whereby he could put him behind the bars, and he would do it if it took him ten years to do it. * * * I remember he stated that—whether it was at that time or not I don't remember—that if Mr. Cobban would settle with him he could put a stop to this investigation; that he hadn't gone so far but what he could put a stop to this investigation.

"Q. Did he intimate to you that he would set it and put a stop to it if Mr. Cobban would pay him the $3,400.00?

"A. That is what I understood from him.

"Q. Then the stopping of this investigation was to be the payment of $3,400.00 from Cobban to Griswold?

"A. That is the way I took it.

"Q. Well, then the notion that you got from this all told was that it was a scheme on the part of Griswold to blackmail Mr. Cobban out of this money?

"A. I made up my mind at that time that it was a blackmailing scheme for the reason that Mr. Griswold was chasing me like a dog at the time. He had got those four affidavits and he was going all over the city of Missoula and trying to get me to go to Mr. Draffen's private office to give my affidavit." (Rec. Vol. 7, pp. 3256, 3257, 3258.)

D. V. Bean testifies in regard to Griswold:

"He met me on the street there, and wanted to show me a contract that he had with Cobban, and I says, 'Chauncey,' I says, 'I don't want anything

to do with you.' But he insisted on it, and insisted on showing me the contract, and he says, 'I will make him pay the thirty-five hundred dollars he owes me there, or I will'—I don't know exactly what the amount was—but he says, 'I will make him pay me thirty-five hundred dollars more on it, and if he does not, I will send him over the road.' * * * Yes, sir, that is just about the words he used; just about the words, he says, 'Zevely is a friend of Draffen, and he can get him out here, and he will raise —— with that —— —— — there, as well as all you other fellows, too.'" (Rec. Vol. 8, pp. 3852, 3853.)

Witness further testifies about Griswold:

"Q. I asked you about the trouble you had with Mr. Griswold?

"A. Well, I will tell you the first trouble I had with him was when I had him up in the north, up in the Flathead country. I had trouble with him then. I caught him stealing everything he could lay his hands on. At the camps there men would leave their door open, and Griswold would steal everything he could lay his hands on, and I told him if he didn't stop it I would get rid of him. * * *

"Q. You say he stole from everybody?

"A. He would get into the camp and go into the cabins and steal everything he could lay his hands on.

"Q. Now, name one thing he stole?

"A. He stole a butcher knife, and he stole a screen that you put coffee in to keep the grounds from going through, and he would steal anything he could get his hands on." (Rec. Vol. 8, pp. 3856, 3857.)

Witness further testifies, being cross-interrogated, as to how much he knew about Griswold's reputation for honesty:

"A. Well, I will tell you: Soon after we got back from that trip on the Flathead country, Mr. Griswold, his brother and a man by the name of Easterly, came up to Hamilton. They came to my office. I had an office there at the time. I was doing logging for the company, and he made a proposition to me, and that proposition was that he would go and look over the land where the timber had been cut and depredations had been committed by the Anaconda Company, and he would give the facts that he had obtained, and lay them before the Interior Department, and the proposition that he made was that unless the company paid a big amount of money for it, they would get cinched, that is, the Interior Department would cinch it, on their testimony, and they would have to pay a large amount of money, and he said, 'If you go in with me on this deal,' he says, 'I will divide with you.' And I said, 'Chauncey, you are a dirty cur, that is what you are.' I said, 'I employed you and your brother when you had nothing to eat, and I took you up there and paid you and your brother, and now you try to work me in this way.' And I says, 'If you fellows want anything to do with the Anaconda Company, it is none of my business, but you can go to ——.' That is the next proposition that Mr. Griswold made to me. He was trying to work a blackmailing scheme on the Anaconda Company there, but I wouldn't have anything to do with it." (Rec. Vol. 8, pp. 3862, 3863.)

Witness further testifies:

"Q. Then I want you again to state if you know

anything about Mr. Griswold, in his life in any way that is wrong, to specify it?

"A. Well, I will tell you. When he came to me and made the proposition to go in with him to blackmail the Bitter Root Development Company and the Anaconda Mining Company, was that the act of an honest man?" (Rec. Vol. 8, p. 3869.)

Witness further testifies in regard to Griswold:

"I simply said this, that he came to me and said, 'I am going to send that report right in, and it will stop you cutting on the permit.' Mr. Kendall, at this time, was cutting under a permit, under a permit that was given to the Anaconda Mining Company, and the Bitter Root Development Company, one or the other of them, I don't know which it was that had the permit at that time, and he said, 'I am going to send that report right in.' And I went there to Mr. Toole, and he was living there then and was manager at that time, and I laid the matter before him, and he says to me that we must keep that report out for three months, and I says, 'I don't know.' And Mr. Toole said, 'We must keep this report up for three months,' and I says, 'Why do you want to do that?' and Mr. Toole says, 'Well, I will tell you. If this report should go in it might stop Mr. Kendall from cutting under the permit, because the report might get them to cancel the permit,' and he said, 'If he won't send it in at this time, it will be all right, but if he does send it in it may stop Mr. Kendall from cutting under the permit.' At that time Mr. Kendall was cutting under a permit, and finally, under Mr. Toole's instructions we paid Mr. Griswold a thousand dollars for keeping that report out for three months, a thousand dollars, when he wasn't entitled to three cents or anything; he had no business there at all. That was under Mr. Toole's instructions,

not Mr. Daly's. At the same time Mr. Kendall was cutting right on the permit which the Government had granted to the Bitter Root Development Company or the Anaconda Mining Company, I don't know which it was at that time." (Rec. Vol. 8, pp. 3873, 3874.)

William K. Kendall testifies that under orders from D. V. Bean, manager of the lumber department of the Anaconda Company, they paid Griswold a thousand dollars, in connection with the blackmailing scheme testified to by Bean. (Rec. Vol. 8, p. 3991.)

Counsel for the Government asks the witness the following question:

"Q. Now, then, do you know of anybody that has told you of anything that Mr. Griswold ever did, anything that was wrong, prior to his making a complaint against this whole crowd of depredators upon the public domain, if you do know such a person, and name him?

"A. I don't know as I could name any particular person, but I have heard it in a general way talked over, that he had been doing that kind of a business all of his life. * * *

"Q. I want to ask you what kind of business you mean when you say that kind of business?

"A. Well, blackmailing.

"Q. You knew then that the thousand dollars that you paid Griswold at that time was blackmailing, did you?

"A. Yes, sir." (Rec. Vol. 8, pp. 3993, 3994.)

Jasper Seeley testifies that he had heard of Griswold

levying blackmail on the Blackfoot Milling Company up in the Bitter Root. (Rec. Vol. 8, p. 4203.)

Edward B. Howell further testifies that word had come to counsel for Cobban in the lawsuit with Griswold, that Griswold had said Cobban had better settle his lawsuit, that he could do Cobban a great deal of good yet in the Government prosecution. (Rec. Vol. 9, p. 4276.)

John M. Peers testifies in regard to conversations which he had with Griswold. He was asked the following question:

> "Q. Now, I will ask you to state whether in that conversation which you had with Mr. Griswold, Griswold said substantially to you that in the case that was pending concerning these timber lands sold to Senator Clark, that he had a lot of testimony up his sleeve, and that he was not going to give that testimony unless he was paid his price for so doing, or words to that effect?
>
> "A. Yes, that is about the way it was as near as I can remember, or that they wanted him to write it out; they wanted him to write the whole thing out, the Government officials did." (Rec. Vol. 10, p. 4983.)

Witness further testifies in regard to Griswold:

> "He said that Mr. Cobban had not used him right, had not paid him what he thought was right, but before they got through that he thought he would make them go some, or something to that effect.
>
> "Q. What was said about his having received

at that time a large sum of money from Mr. Cobban?

"A. He had received money, yes, sir.

"Q. What did he say concerning that, Mr. Peers?

"A. He had received a good deal of money from Mr. Cobban but not enough, not what he thought was satisfactory; that is what he told me, it was not enough.

"Q. Didn't he also say that he expected to get a whole lot more?

"A. Yes, he said he expected to get more out of it." (Rec. Vol. 10, p. 4985.)

C. C. Willis testifies that he had been subpoenaed as a witness before the grand jury in Helena.

"I did not know what for until I got up there, and then it seemed after I got there that the first information I got—I met Mr. Griswold. I met him on the corner right back of Gans & Klein's gent's furnishing goods establishment there. * * * I was acquainted with him, and we got talking, and I asked him what he was doing up there, and he said he was before the grand jury, and so in conversation he said he would go up to the Helena hotel; he wanted me to meet Mr. Zevely, that he had me subpoenaed before the grand jury. I asked him what he wanted to prove by me, that I did not know anything about their Blackfoot timber business at all—I have known that Mr. Griswold and Mr. Cobban had had some trouble, but I did not know a thing in the world about it.

"So we proceeded up to the Helena hotel, and we got there I suppose probably at one o'clock or possibly later. I was subpoenaed, I think, to appear at two o'clock on that day. When we got up

there we did not see Mr. Zezely; he was either at lunch or out somewhere, and we could not see him, and we sat down in the office of the hotel there, and Mr. Griswold told me that he had—well, we had a talk in the office at the hotel and he told me that he had had Mr. Zevely come out and they were *making up a case, and they had it before the grand* jury then, to indict Mr. Cobban for fraudulent timber and stone entries, and that it was his intention to send him to the pentitentiary, that is what he was working at, and he did not care what it cost him, so he landed Mr. Cobban in the penitentiary.

"I told him I knew nothing about it, and he told me he thought probably I might know of some fraudulent entries down in our country, and I might probably be able to give some evidence, and I told him I did not know anything about the timber and stone business, and that I had not taken up any timber myself and had nothing to do with it, and knew not a thing in the world about it, and I would like to know when I could get off.

"So we went there, I think, about two o'clock, over to the United States Court Room, and I met Mr. Rogers, the District Attorney, and I asked Mr. Rogers what I was subpoenaed there for, and asked him if he knew anything about what time I could get off, or what time I would testify. * * * So at eight o'clock I went around to the hotel, and when I got there I did not see Mr. Zevely or Mr. Maynard, either one, but Mr. Griswold was there at that time. * * *

"Mr. Zevely came down and Mr. Griswold introduced me to him, and * * * he told me that Mr. Griswold had had me subpoenaed there, that he didn't know anything about it, but that Mr. Griswold had told him that I could give him some information, so when I told him I did not know a thing in the world about it, that as far as I knew

everything was regular in our part of the country, and I did not know anything about that Blackfoot business at all. * * * So he told me then to come around next morning when court met, I think it was ten o'clock, and he would have it arranged with Mr. Maynard that I would be discharged. So in the meantime, talking with Mr. Griswold, he told me that he had got the worst of it from these people .

"He finally told me *that he would like to get a settlement out of the thing if he could; wanted to get some money out of it, and asked me if I was not acquainted and friendly with Mr. Clark. I told him that I had known Mr. Clark quite a good while, and he wanted to know how it would be for me to talk with Mr. Clark about the matter, and I told him I wouldn't talk to him about a thing of that kind at all, that it was none of my business, and Mr. Clark would think it was none of my business and I would have nothing to do with it. He asked me if I could not get in and help him make the case stick, that he had a good job promised him from the Government if he could make this case stand.*

"I told him I would not be an informer or anything of that kind, but I would not tell anything if I knew it unless I was forced to do it, and I said Mr. Clark bought that timber innocently and Cobban got his money, and if anybody lost by it it would be Mr. Clark, and he had always been friendly to me and I would not have anything to do with it." (Rec. Vol. 12, pp. 5986 to 5991.)

The witness Willis was also asked the following question:

"Q. Now, you told us, Mr. Willis, concerning what Griswold had said to you down in Helena,

during the taking of the testimony by the grand jury as to what he expected to get out of the transaction. I wish you would tell what he said, if anything, as to what he was then expecting to get, or as to what he was actually getting.

"A. When he was at Helena, do you mean?

"Q. Yes, sir.

"A. Well, I asked him where he expected to get off on this proposition. I said to him that if he sent Mr. Cobban to the penitentiary I didn't see how he could keep out of it, and a man that done that was—would get the worst of it and lose everything, *and he said he was promised a good position from the Government if he made this case stand, and he didn't care anything about the timber trespassing business.*

"Q. What I wanted to know was, what, if anything, he said about any money that he was then getting, not as to what he expected to get?

"A. Well, I went to his room. He had a room in the Weinstein block. Well, it was the best room in the house, and I told him that was pretty extravagant on a dollar and a half a day, and he says, *'I am getting more than that for these services.'*" (Rec. Vol. 12, pp. 6002, 6003.)

It is further in evidence that Griswold associated with bad characters and boasted of his acquaintances and associates of that nature. Griswold further admits himself that he was indicted by the grand jury for subornation of perjury and for perjury; that the indictments had been dismissed against him, and in regard to the dismissal, he says:

"The fact of the matter is that Mr. Zevely told me that he thought he could have, and would try

to have the indictments against myself and others who testified to the facts before him in he city of Missoula—he would try to have them dismissed; there was no promise made that he would do it. The indictments were subsequently dismissed." (Rec. Vol. 7, pp. 3506, 3507.)

He also admits himself that he got a thousand dollars from the Anaconda Copper Company, or the Bitter Root Development Company, for withholding the report mentioned. (Rec. Vol. 13, pp. 6577, 6578.)

The testimony of Griswold, according to the uncontradicted evidence of the witness, is entirely unworthy of credit. The testimony of a man who has been guilty of the crimes he admits himself to have been guilty of, namely, perjury, subornation of perjury and blackmail, should not be taken in any court as tending at all to establish any disputed fact testified to by him. When, in addition to that, it is clearly proven that he has been guilty of larceny, and that his reputation for truth and veracity and honesty is bad in the community in which he lives, the testimony not only ceases to be of any weight in a court of justice, but the very presentation of such a witness as the mainstay of the Government's case, necessarily places that case under a cloud of suspicion and stamps it as utterly without foundation or reason for its prosecution.

We say further, that throughout this entire record there is no other witness tending in any way to establish any of the allegations of the complainant's bill. That each and every witness called by the Government

contradicts, rebuts and overthrows the allegations upon which the Government bases its right to recover. That the decision of the court dismissing the complainant's bill could not have been otherwise than it was, in view of the testimony.

The government failed to establish by competent evidence the fraud charged against the entrymen and entrywomen in the bill.

Referring to the statement of facts hereinbefore set forth in this brief under the issues presented by the pleadings in the case, the evidence to support the contention of the Government and to establish on its part the charges in said bill contained, is wanting. With the exception of the testimony given by the discredited witness Griswold, there is no proof to establish the charge that the land was taken up by the entrymen or entrywomen for speculative purposes or for the benefit of any other person than themselves. There is no evidence that there was any false swearing or perjury in the declaratory affidavits filed by the entrymen or entrywomen.

On the other hand, it is not seriously questioned by any competent proof whatever but that each and every entryman and entrywoman was of the requisite age, possessed of the necessary qualifications to make the entry; that the land was subject to entry under the Timber and Stone Act at the time proceedings to that end were instituted and at the time the final receipt and certificate were issued. That the proper notice

was given and published; that the requisite number of witnesses appeared and testified to the essential facts as required by the rules and regulations of the Land Department and under the provisions of law; that the money required to pay the land office fees and the purchase price was paid by the entrymen and entrywomen; that all of the proceedings were strictly in accord with the requirements of the laws and the rules and regulations of the department; that each and every person that sought and did make an entry under the act in question, received his final receipt therefor and the final certificate, and in due time the patent of the United States followed and was delivered to the party entitled thereto. That there was no fraud in the transaction; that each entryman either procured the money as a loan or had it himself; that when he paid for the land there was no obligation whatever on his part, no contract or agreement by which he had stipulated to transfer the title to any person or persons whatsoever.

The entrymen and entrywomen were in some instances people of little or no means. Poverty was an evil from which they had been unable to escape in the course of their lives. They were forced to borrow the money necessary to make the entries and to pay the Government price for the lands. Until these proceedings were instituted by the Government in this case it had not become known that under the rules and regulations of the Land Department poverty was a dis-

qualification which precluded any person guilty thereof from having the advantage of the land laws.

The entrymen and entrywomen had therefore no knowledge of the fact that if they desired to enter the land under the Timber and Stone Act it must be with money which they themselves had acquired prior thereto by means of their own exertions or by inheritance. Nor do we assume that any such law exists at this time.

We apprehend the rule to be that any person who seeks to obtain title to land under the land laws of the Government is entitled to take advantage of the beneficent provisions of those Acts, whether he obtained the money by borrowing or by gift, or in what other manner. It is only necessary that he have the money and pay it for the land at the price fixed by law, and that when he has so made the purchase and the Government has issued its final receipt therefor, he is entitled to the protection of the Government in the subsequent proceedings, until the final issuance of the patent, unless he has been guilty of violating the rstrictions imposed upon him by law with reference to the entry.

In the absence of proof that he has been guilty of violating the law, either in the filing of the declaratory statement or in the subsequent proceedings prior to the issuance of final receipt, every intendment of the law is in his favor. He is to be accorded confidence and belief in his good faith, and the Government has no more right than any other grantor to question that good faith in the absence of any showing or proof.

The evidence in this case, outside of the fact that certain of the entrymen and entrywomen were poor, and the circumstance that after final proof and the issuance of final receipt, they sold their claims to Cobban, is entirely wanting in any of the essential requirements which tend to establish that a fraud has been perpetrated in the acquisition of title. The seventy odd entrymen and entrywomen all go upon the stand and freely and frankly state the source from which they obtained the money with which they made the requisite payments; assert their good faith in making the entry; that they did not take the land up for speculative purposes; that they had no contract or agreement whereby they entered the land for the benefit of any other person except themselves. That after the final proof they in some instances sold the land to Cobban, only after they had made strenuous exertions to find other and better purchasers. That they sold to Cobban because he offered the best price. That they had no contract or agreement with him, and that they took up the land because they considered that it was their right to take up the land under the law; that they had never exercised their right prior to that time; that they went upon the land; they examined it; that it was of the kind and character specified in the law; and that when they had obtained the final receipt from the land office they understood and believed that there was full authority given them to make such disposition of their purchase as if they had purchased it from any private

individual instead of from the Government of the United States.

In the Maxwell Land Grant Case, 121 U. S., 325, the court says, on page 379, et seq:

> "The great importance of this case, as regards the immense quantity of land involved and its value, reinforced by the circumstance of the number of cases coming before the courts, in which, under the directions of the Attorney General, attempts are made to set aside the decrees of the courts, the patents issued by the Government, and, in this case, an Act of Congress, seems to call for some remarks as to the nature of the testimony and other circumstances which will justify a court in granting such relief. The cases of this character which have come to the Supreme Court of the United States have been so few in number that but little has been said in regard to the general principles which should govern their decision. There are decisions enough to guide us in cases where a patent or other title derived directly from the Government has been questioned in a collateral proceeding, brought to enforce that title or to assert a defense under it; but the distinction between this class of cases, in which all the presumptions are in favor of the validity of the title, and in regard to which a wise policy has forbidden that they should be thus attacked, and those like the present, in which an action is brought in a court of chancery to vacate, to set aside, or to annul the patent itself, or other evidence of title from the United States, is very obvious. In either case, however, the deliberate action of the tribunals, to which the law commits the determination of all preliminary questions and the control of the processes by which this evidence of title is issued to the grantee, *demands that to annul such an instrument and de-*

stroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be within the class of causes for which such an instrument may be avoided."

On page 381:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, *the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal! In this class of cases, the respect due to a patent, the presumption that all the preceding steps required by law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof."*

The court further says in this same opinion, page 381:

"It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the

authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

In the case of United States v. Stone, 2 Wall., on page 535 the court said:

> "A patent is the highest evidence of title, and is conclusive as against the Government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was originally done by *scire facias*, but a bill in chancery is found a more convenient remedy."

It has been contended in the case at bar that so long as the patent is unissued the right of the Land Department to withhold it, to take proceedings to have the entry cancelled, when there is reason to believe that there has been fraud committed, is not only clear under the authorities, but that the resort to a court of equity afer the issuance of patent by the Government is only the exercise by the Government of an appeal to another branch of its own jurisdiction. That it vests the same rights in its courts to annul a patent for fraud that it does in the Land Department prior to the issuance of patent, the only difference being the difference in the department, one being in the executive and the other in the judicial.

This, as we understand it, *is an assertion by the Government that it, being supreme, is not bound like a private litigant to necessarily establish by evidence the facts upon which it bases its right to annul its own solemn grant;* but that so long as the patent is unissued it can go into the Interior Department having jurisdiction of the issuance of patents, and annul and set aside the proceedings taken to secure title to the land, but that if through the lapse of time a patent has issued, the same supreme sovereign authority rests in the Government to go before its own tribunal in the judicial branch of the Government and demand, without requisite or sufficient evidence, that the court shall at its behest annul and set aside its own solemn grant of title.

The right under the well considered decisions of the Federal Courts that rests in the Interior Department to refuse to issue patent and to cancel an entry even after the issuance of the final receipt, prior to patent, is sufficiently well established upon the ground that prior to the issuance of patent the title is in the Government, that is, the legal title. The entryman has only an equitable right to receive the evidence of title, denominated a patent. If it occurs that fraud has been committed or that a trick has been practiced upon the land officers, the entry can be cancelled and patent refused. But after the patent has issued the title has passed from the Government. The jurisdiction of the Interior Department has ceased. The right of the citizen has intervened, that right has become ab-

solute, and this is a new doctrine that the Government shall be entitled to exercise over its courts such absolute sovereignty that as against the citizen the court shall be in duty bound to obey its behests and annul or cancel a patent without regard to the evidence or the rights that may have been acquired by bona fide purchasers.

That this claim is without merit is clear from the decision of the Supreme Court of the United States in the case of Atlantic Delaine Co. v. James, 94 U. S., 207, wherein the court said:

> *"Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them."*

In Story's Equity Jurisprudence, Sec. 157, it is said that relief will be granted in cases of written instruments only where there is a plain mistake, clearly made out by satisfactory proofs.

Chancellor Kent, in the case of Lyman v. United Ins. Co. 2 Johns. Ch. 632, which had reference to reforming a policy of insurance, says:

> "The cases which treat of this head of equity jurisdiction require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court."

See also Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass., 290.

The Maxwell Land Grant Case above referred to was cited with approval by the Supreme Court of the United States in the case of Colorado Coal Company v. United States, 123 U. S., 307, in which the court said:

> "It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text writer: 'When the negative ceases to be a simple one—when it is qualified by time, place or circumstance—much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative."

In the foregoing case the court cites with approval from 1 Greenleaf on Evidence, Section 78, as follows:

> "To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party

who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, this negative is an essential element in his case."

In the case at bar the Government grounds its right of action upon the allegation that the entrymen did not enter the land in good faith for their own use and benefit; did not themselves pay the money required for the entry, but on the contrary were employed to enter the land for the benefit of another from whom they received the money requisite therefor. These negative allegations were necessary to be proven by the Government. It was essential that there should have been specific and definite testimony to support the same—mere inferences, according to the decisions already quoted, could not avail. The Government, however, did not produce evidence to sustain the allegations of the bill, but on the contrary produced witnesses who directly testified against the contention of the Government. With the exception of Griswold there is no witness who gave any testimony whatever tending in any manner to support the contention of the Government. Upon this subject, Judge Knowles, in the opinion rendered in this case said:

"As to the witness Griswold, who was certainly a most willing witness for the complainant, * * * it does not seem to me that in considering a case like this, under the rule laid down in the Maxwell Land Grant Case, supra, his testimony ought to be given any weight. According to his own admissions

he had wilfully, deliberately and corruptly sworn falsely as a witness for some of the entrymen and entrywomen who made proofs in the land office; he had also made an affidavit contradicting his evidence as to the agreement he had with Cobban, which agreement he previously claimed had authorized him to make contracts for the purchase of their lands with the entrymen and entrywomen before their final proofs were made in the land office. His general reputation for honesty and truthfulness was attacked in court by respectable witnesses, and he did not sufficiently rebut this evidence. It was shown that he had received money from parties to suppress evidence concerning the alleged illegal cutting of timber upon the public domain. It was further shown that he had received some kind of assurance from representatives of the Government that should he testify as he had stated to them he might be awarded public employment. What passed between him and the Department of the Interior upon this subject, that Department claimed as being privileged and refused to divulge. Such a witness as this could hardly furnish proofs clear and satisfactory.

"If we consider the evidence of the entrymen and entrywomen we find that they positively and emphatically deny that they had made any contracts to convey the lands to Cobban before final entry and purchase. While there may be suspicion that this evidence was not correct, and a supposition that there must have been made some contract between Cobban and themselves in regard to this matter, it must be borne in mind that these witnesses were witnesses produced by complainant, and except where the witness Griswold testified otherwise, no evidence was introduced to contradict this, and the court is called upon by the complainant to find from its suspicion or supposition that there was such a contract. Cobban himself

testified that he knew the law and knew that such a contract was in violation thereof, and that he was careful to make no such contract whatever; and again, Cobban was a witness for the complainant." (Opinion Knowles, Judge, Rec. Vol. Pl. & Ind., pp. 66 and 67.)

In the case of the United States against Budd, 144 U. S., 154, the Supreme Court of the United States again quotes with approval from the Maxwell Land Grant case, and says, on page 162:

> "This case is even stronger in its aspects than some that have been before us, for if the particular wrong charged upon the defendants be established the money paid is, by the second section of the act, forfeited, and there is not even the possibility suggested in the case of United States v. Trinidad Coal Co., 137 U. S., 160, of an equitable claim upon the Government for its subsequent repayment. The hardship of such a result, so different from that which is always enforced in suits between individuals, makes it imperative that no decree should pass against the defendants unless the wrong be clearly and fully established.
>
> "The particular charge is, that Budd, before his application, had unlawfully and fraudulently made an agreement with his co-defendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such co-defendant. Upon this question, the fact that stands out prominently is, that there is no direct testimony that Budd made any agreement with Montgomery, or even that they met, or either knew of the existence of the other, until after Budd had fully paid for the land. No witness ever knew or heard of any agreement. What, then, is the evidence upon which the Government relies? It

appears that Montgomery purchased quite a number of tracts of timber lands in that vicinity, some ten thousand acres, as claimed by one of the witnesses; that the title to twenty-one of these tracts was obtained from the Government within a year, by various parties, but with the same two witnesses to the application in each case; that the purchases by Montgomery were made shortly after the payment to the Government, and in two instances a day or so before such payment; that these various deeds recite only a nominal consideration of one dollar; that Budd and Montgomery were residents of the same city, Portland, Oregon; that one of the two witnesses to these applications was examining the lands in that vicinity and reporting to Montgomery; and that the patentee, Budd, years after his convevance to Montgomery, stated to a Government agent who was making inquiry into the transaction, that he still held the land and had not sold it, but that it was 'in soak.' But surely this amounts to little or nothing. It simply shows that Montgomery wanted to purchase a large body of timber lands, and did purchase them. This was perfectly legitimate, and implies or suggests no wrong. *The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the Government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase. If when the title passes from the Government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied.* Montgomery might rightfully go or send into that vicinity and make known generally, or to individuals, a willingness to buy timber land at a price in excess of that which it would cost to obtain it from the Government; and any person knowing of that offer might rightfully go to the land

> office and make application and purchase a timber tract from the Government, and the facts above stated point as naturally to such a state of affairs as to a violation of the law by definite agreement prior to any purchase from the Government—point to it even more naturally, for no man is presumed to do wrong or to violate the law, and every man is presumed to know the law."

These contentions in the Budd case are similar to the contentions of the Government as set forth in its bill of complaint, with the exception that the Budd case seems to have been founded upon a more specific statement of alleged wrongful acts than the case at bar. The Supreme Court goes on to say further in this connection, on page 163:

> "And in this respect the case does not rest on presumptions, for the testimony shows that Montgomery knew the statutory limitations concerning the acquisition of such lands, and the penalties attached to any previous arrangement with the patentee for their purchase. Nor is this a case in which one particular tract was the special object of desire, and in which therefore it might be presumed that many things would be risked in order to obtain it; for it is clear from the testimony that not the land but the timber was Montgomery's object, and any tract bearing the quality and quantity of timber (and there were many such tracts in that vicinity) satisfied his purpose."

The court then goes on to discuss the evidence and the contentions of the complaint, and says:

> "And this is all the testimony which in any manner points to wrong in this transaction. Surely this does not come up to the rule so well estab-

lished, as to the necessary proof in a case like this."

In the case of Lewis v. Shaw, 70 Fed., 289, Judge Hanford, in the United States Circuit Court of Washington, in passing upon an entry made under the Timber and Stone Act, followed the decision in the case of U .S. v. Budd, and in commenting upon the facts as disclosed at the hearing, said:

> "It is claimed that Miller did not purchase the land in good faith, for his own use, but acted merely as the instrument of Ryan, and that it was agreed between them that the title which Miller should acquire, should inure to the benefit of Ryan. It was on this ground that the Secretary of the Interior cancelled the entry. The facts relied upon to sustain the Secretary's conclusion are that Miller was an employe of Ryan, and obtained his first information with reference to the land, from Ryan; that, before deciding to enter it as timber land, he consulted with Ryan, and obtained from him a promise to advance the amount of money necessary to make the entry, and that Ryan agree to take, as security for the amount of the purchase price which he should advance, a conveyance of a one-half interest in the land; that Ryan did advance money to Miller at the time his final proof was made; that, a few days afterwards, Miller executed a contract to convey a one-half interest in the land, as security for the money advanced, and an additional sum which Miller owed on account of other dealings, in all amounting to about $475. Ryan then commenced cutting timber on the land, and actually removed most of the merchantable timber, and he subsequently purchased Miller's remaining one-half interest for the price of $1,000. These facts only gave rise to an inference that Miller had

contracted, before entering the land, to give Ryan an undivided one-half thereof, after his title should be perfected, which inference, in my opinion, is overcome by the positive and direct testimony of both Ryan and Miller, that no such contract was made. They both testified that, Ryan being in need of money, called upon Miller to repay him the amount secured by the contract for a one-half interest in the land, and that, Miller being unable to make the payment, Ryan took steps to put the land on the market, and finding that it had enhanced in value, he purchased Miller's entire interest, and resold it at the first opportunity. The facts are not necessarily inconsistent with an honest entry by Miller, and certainly not sufficient to compel an inference of fraud sufficiently strong to overcome the only positive testimony bearing upon this vital point. To justify a forfeiture, proof of the facts constituting fraud or perjury must be clear and convincing. Mere inferences are not sufficient."

This case has a state of facts somewhat similar to those contended for by the Government in this case, as set forth in the bill. There is the same failure of proof on the part of the Government to establish the allegations of its bill; the same direct and positive statement by the entrymen and by Cobban that no contract or agreement existed, and the Circuit Court held in the case cited that the inference to be drawn from the facts might cast suspicion upon the entry, but was not sufficient to establish a case authorizing a decree of forfeiture.

In the case of United States v. Detroit Timber & Lumber Company, 124 Fed., 393, decided by the Circuit

Court of Arkansas, and which has since been affirmed by the Circuit Court of Appeals for the Eighth Circuit, it appeared that the defendant lumber company loaned money without security to persons to enable them to enter and pay for land under the Timber and Stone Act, in the expectation that when the entrymen obtained title it would be enabled to buy the timber from such land by reason of the fact that it had the only mill in the vicinity. There was no agreement for the sale prior to the entries, but each man was free to keep the timber or sell it to others. Judge Rogers, in rendering the decision of the court, said:

> "Assuming all these things to be true, and that their motive for lending the money and assisting in making the entries was with the hope of ultimately getting the timber, which one of these acts is either violative of the letter or spirit of the Timber and Stone Act?"

After citing and quoting from the case of United States v. Budd, supra, and the Maxwell Land Grant case, supra, the court said:

> "It is clearly established that Martin and Alexander both knew the provisions of the Timber and Stone Act. They knew that they could obtain these lands in the manner in which they were obtained without violating the law, and also with the reasonable safety of escaping any loss by reason of the loans they made. Nothing could have been more foolish than for them to violate the statute in order to get the land, when they could get it without violating the statute, and without running any considerable risk by reason of the loans.

Assume if you will, that Martin and Alexander and Copeland were all corrupt and dishonest, and willing to violate the law, if it was necessary to get the lands, still common prudence and common sense alike would suggest that if they could get them lawfully, and at the same price that they could get them unlawfully and dishonestly, that they would pursue the former course. These lands could not be entered by anybody at less than $2.50 per acre. They could be entered for $2.50 an acre by persons who could lawfully enter them, without any agreement with the Martin-Alexander Lumber Company just as well as they could with an agreement; and, once being entered, they could be purchased by the Martin-Alexander Company as well as any one else, and under much more favorable conditions, for the reasons already stated; and, moreover, the Martin-Alexander Lumber Company were informed by Copeland that the men with whom they were dealing were honest men, and men who would pay their debts, and therefore they assumed practically no risks. The greater number—indeed, nearly all—the men were then in their employ. The Martin-Alexander Lumber Company was running a mill there, and also a commissary store, and had open accounts with the greater number of these entrymen. They knew them themselves, and were in a measure familiar with their homes and conditions. There is no rule of law better established than where, from a given state of facts, two opposite inferences may be drawn, that inference will be adopted which is lawful and honest, and not that which is unlawful and dishonest."

The court then goes on to say, on page 402:

"The facts established in this case, as a whole, are not inconsistent with the validity of the pat-

ent, or the integrity or legality of the actions of the defendants in entering the lands. Before patents which have been solemnly granted by the Government shall be cancelled and set aside, the facts adduced to establish the fraud should be inconsistent and irreconcilable with the integrity of the patent and the legality of the actions of the parties charged with the fraudulent entries, and should be so satisfactory as to make it clear to the court that the lands were procured by fraud."

In the recent case of United States v. Stinson, 197 U. S. 204, the court said:

> "While the Government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent; the presumption that all the preceding steps required by law have been observed before its issue; the immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof. Maxwell Land Grant Case ,121 U. S. 325; Colorado Coal Company v. United States, 123 U. S. 307; United States v. San Jacinto Tin Company, 125 U. S. 273; United States v. Des Moines etc. Company, 142 U. S. 510; United States v. Budd, 144 U. S. 154; United States v. American Bell Telephone Company, 167 U. S. 224."

The Circuit Court before whom the case was tried in the first instance, upon a review of the testimony,

found that there was no fraud, and decreed a dismissal of the case. The opinion of Judge Knowles is found in Rec. Vol. of Pl. & Index, pp. 59 to 67, inclusive. Upon the weight to be accorded to the opinion of the trial court, this court in the case of U. S. v. Stinson, supra, at page 207, says:

> "Further, the Circuit Court, on its review of the testimony, found that there was no fraud and decreed a dismissal, and that finding and decree were approved by the Court of Appeals. While such a finding is not conclusive upon this court, yet it is entitled to receive great consideration, and will not be disturbed unless plainly against the testimony."

Under these authorities, therefore, it is submitted that there is an absolute failure of proof on the part of the Government to establish that any fraud whatever was committed, and that the Circuit Court in rendering its decision dismissing the bill was fully justified in so doing, by reason of the fact that the Government had failed to establish a case warranting an inference of fraud even, as against the entrymen themselves, as well as upon the finding of the Circuit Court that the defendant was a bona fide purchaser.

III.

THE DEFENDANT WAS AN INNOCENT PURCHASER OF SAID LANDS, AND TOOK TITLE TO THE SAME WITHOUT ANY NOTICE WHATEVER OF THE ALLEGED FRAUDULENT AND ILLEGAL ACTS OF THE ENTRYMEN NAMED IN SAID BILL.

The discussion under this head will be divided into two branches:

1. The evidence in the record upon the question of notice to the defendant; and,

2. The law relative thereto as it has been applied by the courts in cases of like character.

There is no evidence to establish or tending to establish that the defendant had knowledge or information at the time of the conveyance to him by Cobban that said lands, or any of them, had been entered in violation of the laws of Congress, or that the entrymen had entered the same for hire, upon speculation or for the purpose of enabling the defendant to procure title to the same by evasion or in violation of the laws of Congress.

On the contrary, the evidence is clear and uncontradicted that the defendant W. A. Clark was a purchaser in good faith, for a valuable consideration, and without notice, either actual or constructive, of the alleged vio-

lation of law in the inception of the title to said land from the Government of the United States.

Under the head of **THIRD** in the Division **II.** above, we have quoted and cited the testimony of the witnesses that have testified in this case on the part of the Government and on the part of the defense. It is clear from an examination of that testimony that the defendant had no knowledge whatever of any alleged violation of the laws of Congress in the entry of said lands; on the contrary, the evidence is undisputed that he had no knowledge of that character. His own testimony, the testimony of Cobban, the testimony of Mr. Wethey, the testimony of Judge Bickford, and the testimony of McLaughlin, each and all are clear upon this point, and their testimony is in no way disputed or in any manner attempted to be controverted by the Government. It is further clear that none of the entries made by the various entrymen and entrywomen were made in violation of the Act of Congress. Each and all of them testify that they were made in good faith for their own benefit, and without a contract or agreement to convey. The fact that they were in indigent circumstances, were compelled to borrow money to make the entry, in no way militates against their good faith. The only one who makes any attack upon their testimony is Griswold, a confessed perjurer. It is also clear, and there is no evidence to the contrary, that none of the entrymen and entrywomen were hired to make the entries which they did make; that they did not make

them upon speculation or for the purpose of enabling the defendant to procure title to the same by evasion or in violation of the laws of Congress or in any other than a regular way. And therefore this issue, in respect to which the burden of proof rested on the Government, is unsupported by any testimony on the part of the Government, and is entirely rebutted and contradicted by the clear, unequivocal and reliable testimony of the defendant's witnesses.

Further, there is no controversy but that the uncontradicted evidence established the following facts:

That each and every entryman and entrywoman pursued the regular and proper course according to the rules and regulations of the Land Department in obtaining the final certificate and final receipt for the lands entered by him or her at the land office; that the final receipt was duly and regularly issued; that after the issuance of the final receipts warranty deeds to R. M. Cobban were duly made, executed and delivered; that these deeds were placed upon record; that before Cobban offered to sell any of the lands to defendant, abstracts of title showing the issuance of final receipts to the entrymen and entrywomen, the execution, delivery and recording of the deeds from the entrymen or entrywomen to said Cobban; that there were no incumbrances upon the land of record, and that the title was in said Cobban, were submitted to the counsel for the defendant, were examined by him and approved.

That the price agreed upon for the lands, between

the defendant and Cobban, was $1.25 per thousand feet of standing timber, according to the report of the estimators, who examined the land.

That the consideration mentioned in the deeds was based upon the foregoing price for the land. That this price was the market value of the property at that time, and was a fair and full consideration for the land. That the consideration named in the deed is the true consideration paid by defendant.

That warranty deeds to the land purchased were executed, delivered and placed of record by Cobban and his wife to the defendant.

That the defendant had no notice whatever of any alleged infirmity in the title to the land; was never put upon inquiry; had no reason to suspect that there had been or was any irregularity in the entry of the lands by the entrymen and entrywomen who entered the same.

That Government patents to all of the land in controversy in this suit had been duly issued, delivered and recorded, prior to the commencement of this suit.

That the defendant never at any time advanced any money whatever to Cobban for the purpose of having title to the lands in controversy, or any part of them, secured from the Government. That Cobban was never at any time the representative or agent of the defendant in any of the transactions. That Cobban purchased the lands from the entrymen and entrywomen

and sold the land to the defendant, and that the sale to the defendant was an actual out and out sale of each body of land included in the particular deed conveying the same.

There is not in the entire record a particle of testimony showing or tending to show that Cobban was acting for or on behalf of defendant in procuring title to the lands, and the evidence is uncontradicted that he did not so act.

It is therefore clear from the testimony that the defendant was in fact a bona fide purchaser for the full value of the lands in question, and had no notice whatever, direct or indirect, of any alleged infirmity in the title of the entrymen or entrywomen to the lands or any part thereof.

The witness H. T. Wilkinson, the County Clerk and Recorder of Missoula County, Montana, testifies to the recording of the various patents issued by the United States to the entrymen and entrywomen for the lands in that county. (Rec. Vol. 2, pp. 608 to 611.) Wilkinson also testifies to the filing and recording of the deeds from R. M. Cobban and wife to the defendant for the lands in the County of Missoula.

Phil Grennan, County Clerk and Recorder of Deer Lodge County, also testifies to the filing and recording of the deeds from Cobban and wife to the defendant of lands in the County of Deer Lodge.

George D. Greene, the Register of the United States

Land Office at Helena, Montana, was called as a witness and testified to the manner in which the land entries were made under the Timber and Stone Act in the land office. A full and complete set of papers in a particular case were introduced in evidence as a part of his testimony. (Rec. Vol. 2, pp. 614 to 654.) Greene is subsequently called as a witness and testifies as to the proceedings in the land office in the entry of each of the entrymen and entrywomen specified in the bill of complaint, to the issuance of the final receipt and the issuance of the final certificate and the subsequent issuance of patent and delivery of the same. (Rec. Vol. 5. pp. 2463 to 2543.)

Greene also says that in the making of proof and in the proceedings before the land office throughout, the entries were made according to well established rules by which the land office was guided, and the people appeared at the office in the regular and usual order of business, and witness takes up each entry as the same appears to have been made at the Helena Land Office, and says that all of the entries at the Helena Land Office involved in the case, were regularly made, in proper form, and were duly and regularly passed to patent, final receipts issued therefor, and patent subsequently issued and delivered. There was nothing upon the face of the papers or in the proceedings in the land office to indicate that there had been any irregularity in the entries whatever. (Rec. Vol. 5, pp. 2467 to 2546.)

To the same effect is the testimony of William Q. Ranft, Receiver of the United States Land Office at Missoula, Montana, as to the entries of lands under the Timber and Stone Act made at the land office of which he was Receiver, and the witness takes up each final receipt issued to the various entrymen and entrywomen for the lands involved in this case. (Rec. Vol. 2, pp. 661 to 679.) The witness testifies subsequently that the procedure in the land office was regular and the receipt regularly issued.

Elmer E. Hershey, Register of the United States Land Office at Missoula, testifies as to the entries of the various entrymen and entrywomen at the Missoula Land Office, showing the full proceedings as to each entryman and entrywoman for the lands specified in the bill of complaint at said land office; the issuance of final receipt and the subsequent issuance and delivery of the patent. He also states that each and all of the matters and proceedings in said entries were regularly and properly conducted, and that there was nothing in any of said entries to indicate that there had been or was any irregularity whatever in said entries or in the manner in which the title had passed from the Government to the entrymen or entrywomen. (Rec. Vol. 2, pp. 906 to 962.) He also states and sets forth the patents that were issued from the land office, with the date (Rec. Vol. 2, pp. 986, 987), and says in response to the following question:

"Q. Do you at this time recall any matter or

thing in the conduct of your office with reference to final proofs, which has been neglected either by you or by the Receiver of the land office?

"A. No, sir; the proofs were regular in every shape and form. I know of nothing that could be done different in any particular to what was done." (Rec. Vol. 2, p. 995.)

The testimony of W. M. Bickford is that as counsel for the defendant he examined each and every abstract of title furnished by Cobban, which included all of the lands in question, and that each and every abstract showed the title to be in Cobban; that final receipt was issued from the land office, and that all of the proceedings relative to the passing of title from the Government to the entrymen and entrywomen, and from the entrymen and entrywomen to Cobban, according to the abstract, showed no defect or infirmity whatever. The abstracts taken up by the witness were referred to and introduced in evidence. (Rec. Vol. 7, p. 3686, to Rec. Vol. 8, p. 3698.) Witness then testified:

"I delivered the abstracts of title to Mr. A. H. Wethey, with my approval of those that I have read. Subsequent to that time a deed was presented to me,—or rather at various times deeds were presented to me—which would be a more accurate way of putting it,—and the abstract of title having in my judgment shown that the titles to the land mentioned in the abstracts were in Mr. R. M. Cobban, I approved the same.

"The deeds from R. M. Cobban were finally presented to me to examine to see if they were in proper form, and if they contained proper descriptions of the land that was to be conveyed to

Mr. Clark, and after an examination of them I wrote a letter—I either wrote a letter or presented the deed in person to Mr. Wethey—and told him that the deed was in proper form, and conveyed the title to Senator Clark." (Rec. Vol. 8, pp. 3699, 3700.)

The witness testifies in response to the following question:

"Q. Now, Judge, I wish you would state what knowledge or information or notice of any character you had to the effect that there was any infirmity in any of these entries made by the persons who appeared to have made the entries on the abstracts?

"A. I had no knowledge or information whatever, and I had had a good deal of experience and was personally acquainted with the officers of the United States Land Office at Missoula, having known them for a number of years intimately in business and social relations, and I know them to be men of unusual ability and unquestioned honesty and integrity, and that they would not for one moment, under any circumstances countenance anything that was wrong or unlawful or fraudulent, and the fact that these men, whom I have known so long, had affixed their signatures to the final receipts showing that final proof had been made upon this land, was proof to me that they had been satisfied of the correctness of the proof and there was nothing in the abstract of title showing that there was any controversy concerning the land whatever.

"Q. What knowledge or information of any character did you have concerning any relations which existed between Mr. Cobban and any of these entrymen of any agreement that existed between them?

"A. I had no knowledge whatever, sir." (Rec. Vol. 8, p. 3703.)

The witness further testifies:

"Mr. Cobban represented to Mr. Clark that he was the owner of certain timber lands in Missoula and Deer Lodge Counties, and that he was willing to sell the lands for a certain price; that the lands were valuable for the timber upon them, and that he would be willing to sell at a price which he mentioned." (Rec. Vol. 8, p. 3704.)

Mr. A. H. Wethey testifies that he was the general manager of Mr. Clark's business, and had been such since 1888. He says:

"We did not buy any of the land at all until the abstract had been submitted and approved by Mr. Bickford." (Rec. Vol. 9, p. 4387.)

Witness further says:

"I never examined the abstract of title myself, but Mr. Cobban furnished us with warranty deeds, and the abstract had been approved by our counsel, and we thought we were perfectly secure in purchasing the land." (Rec. Vol. 9, p. 4388.)

The witness then takes up each deed from Cobban and wife to defendant; testifies that he paid the consideration therefor as set forth in the deed, and that he had no knowledge whatever with reference to the manner in which the land had been acquired from the United States. (Rec. Vol. 9, pp. 4390 to 4405.) The witness further testifies as to each one of these:

"I had no knowledge of how the lands were en-

tered upon, or how the title was acquired from the United States Government."

"Q. Did you have any knowledge with reference to the business relations existing between Mr. Cobban and Senator Clark?

"A. There were no business relations at all.

"Q. I will ask you to state whether at that time or at any time mentioned in any of these deeds Mr. Cobban was the agent of Senator Clark?

"A. No, sir.

"Q. Has the condition or relationship of principal and agent ever existed between them?

"A. It has not.

"Q. Was there ever, to your knowledge, any contract or agreement between Senator Clark and R. M. Cobban, by the terms of which Cobban was to be charged with the duty of procuring title from the Government of the United States for any land or lands at any time?

"A. No, sir.

"Q. From your conversation with Senator Clark, and from your general knowledge of these transactions, I will ask you to state whether or not it is a fact that these were out and out sales or whether there was any prior agreement with reference to the acquiring of this title in the interest of Senator Clark?

"A. They were out and out sales; he had nothing to do with the acquisition of the property in any way." (Rec. Vol. 9, pp. 4395, 4396.)

The witness also introduced in evidence the checks, letters and contracts showing the transactions between Cobban and Senator Clark, and it appears that he himself carried on the negotiations and conducted the busi-

ness, and was familiar with every detail thereof. There is also introduced in evidence the deeds and the letters of counsel with reference to the title, showing a clear title in the opinion of the attorney for the defendant.

Witness further says with reference to the transactions, that after they had purchased the first parcel of land:

> "We did stop there, and neither the Senator nor myself expected to buy any more, and we didn't know that when he came along again and said he had some more that he made the proposition to give the Senator an option on an additional number of feet that he had secured. He was doing that without our knowledge, and without his revealing to us at all what he was doing. We had no arrangement with him of any kind. We did not know that he was going on and securing timber." (Rec. Vol. 9, p. 4494.)

W. A. Clark, the defendant, testifies:

> "Q. What do you know, if anything, of Robert M. Cobban having entered into any written contract with one C. E. Griswold, of Missoula, concerning the acquiring of title to lands of the United States?
>
> "A. I know nothing about it.
>
> "Q. What do you know, and what have you to say with reference to any knowledge you had at any time of Robert M. Cobban procuring title to public lands from the United States Government. Do you know anything concerning that matter?
>
> "A. I know nothing whatever of his procuring title to lands.
>
> "Q. I will ask you what, if any, transactions

you had with Robert M. Cobban in the year 1899 with reference to the purchase of timber lands from him?

"A. I made some purchases from him in the summer of 1899." (Rec. Vol. 10, pp. 5099, 5100.)

The witness further testifies:

"Q. I will ask you to state whether or no the consideraion mentioned in the deeds which you now hold in your hand is a true consideration for the conveyance of the lands mentioned therein?

"A. They are true considerations.

"Q. Will you kindly state how it happened that this transaction took place, giving as near as you can, the details which led up to the purchase of this land by you?

"A. I do not recollect clearly the details of the negotiation that led up to the purchase of this land. It is my impression that this matter was first called to my attention by Mr. Wethey, my manager, and that it was placed before me for my consideration. I am not sure whether I wrote to Mr. Wethey about this matter or not, I am not positive about it, but it is my impression that I had a talk with him about it before the matter was closed." (Rec. Vol. 10, pp. 5100, 5101.)

Witness further testifies:

"I did not see the abstracts of title. They were presented to Mr. Wethey and I instructed him to submit them to my attorneys for examination to see if they were all right.

"Q. Did you accompany that instruction to Mr. Wethey to the effect that unless the abstracts were perfect you did not care to purchase?

"A. I did. I always do that." (Rec. Vol. 10, p. 5101.)

The witness further testifies that as to each and all of the deeds, the consideration mentioned is the true consideration; that the money was actually paid therefor, as therein specified; that he had no knowledge of the manner in which Cobban acquired title, but only that he was the owner of the land. Witness further testifies that with reference to the deeds of November 11th and 13th:

> "There was a contract in connection with these transactions whereby these deeds were to operate as mortgages for the security of the money loaned and there was an option to purchase given me." (Rec. Vol. 10, p. 5104.)

Witness further testifies:

> "I availed myself of the options which were given in the contract—collateral contract—a part of the amount was paid and the balance due." (Rec. Vol. 10, pp. 5105, 5106.)

Witness further testifies that Cobban borrowed money of him for the purpose of purchasing the Higgins Block, but he cannot distinctly recollect the transaction. This further appears:

> "Q. Did you ever have any connection or acquaintance with any of the entrymen or entrywomen who entered lands under the Timber and Stone Act?
>
> "A. None whatever.
>
> "Q. What have you to say with reference to having either employed men yourself or authorized anybody else to employ men for you for the purpose of entering lands under the Timber and Stone Act?

"A. I never employed any one for any such purpose.

"Q. Did you ever authorize anybody to do it?

"A. I never authorized anybody to do it.

"Q. What have you to say as to having any contract or agreement with any one to do it?

"A. Never in my life made any such contract with any one or authorized any one to make it for me.

"Q. Did you ever hear of any contract of that kind being made?

"A. I never heard of any being made.

"Q. What have you to say with reference to your knowledge of the manner of acquiring title to land you purchased prior to the time when actual proof had been made?

"A. I had no knowledge as to the manner of the acquiring of title to land." (Rec. Vol. 10, pp. 5109, 5110.)

R. M. Cobban testifies:

"Q. I wish you would state in what respect, if at all, you acted as the agent of the defendant, W. A. Clark, during the year 1899?

"A. I did not act as the agent of W. A. Clark at all.

"Q. And what have you to say as to acting as agent of W. A. Clark in the acquisition of titles to timber lands at any time?

"A. I never have acted as the agent, either—of W. A. Clark—in procuring the entry or buying of timber lands.

"Q. What have you to say as to having so claimed to act?

"A. I never claimed to have acted as his agent.

"Q. It is averred in the bill of complaint herein, Mr. Cobban, that sometime after the first of January, 1898, claiming to act for the use and benefit of the defendant, W. A. Clark, in so doing, that you set about the business of procuring the title to and possession of lands described in the bill of complaint. What have you to say as to your having so set about?

"A. I never set about as the agent of W. A. Clark in any way.

"Q. It is further averred that in pursuance of that object, that is, with a view to acquiring the title to lands for W. A. Clark, you entered into a contract with one C. E. Griswold—meaning Chauncey L. Griswold. What have you to say as to that?

"A. I never entered into any contract as the agent of W. A. Clark.

"Q. Or for the purpose of acquiring lands for him?

"A. No, sir.

"Q. It is further averred in the bill of complaint, that in the conduct of such business you associated yourself with John B. Catlin, and Griswold, referred to, with a view to acquiring title to these lands for the defendant, W. A. Clark. What have you to say as to that?

"A. It is false.

"Q. And it is further averred that the three parties, Cobban, Griswold and Catlin, by and through themselves and others, examined the lands, and procured various persons of both sexes, for hire, to enter land under said Act, meaning the Act for the entry of timber and stone lands. What

have you to say as to your having procured persons for hire to enter such lands?

"A. I never did.

"Q. Now, it is averred in the same connection that you paid their expenses and those of their witnesses, and paid the price of acquiring it at the proper land office of the United States— for the purpose of acquiring such titles—within the jurisdiction of which said parcels of land were respectively situated. What have you to say as to that, Mr. Cobban?

"A. I never did, as the agent of W. A. Clark, or with any agreement that they were acting— that they were to transfer the lands to me." (Rec. Vol. 10, pp. 5132, 5133.)

Witness further testifies:

"Q. What arrangements, if any, did you have with the defendant, W. A. Clark, prior to the time that you set about to acquire title to timber lands in the Blackfoot, that you would convey to him, when you had acquired title?

"A. I had never spoken to Mr. Clark or any of his agents in regard to the timber until I had acquired considerable timber on the Blackfoot River." (Rec. Vol. 10, p. 5144.)

"I met Mr. Clark in his office and told him that I had some timber lands for sale on the Blackfoot River, and I told him what—about how much I had, what I had, and I told him what I would ask him for it. I offered to sell it for a dollar and a quarter a thousand, and he took the matter under advisement. The conference only extended over about five minutes with Mr. Clark. Later on it was taken up with Mr. McLaughlin, and my business was done entirely with Mr. Wethey, Mr. Bickford or Mr. McLaughlin, and at that time Mr.

Clark did not give me an answer definitely, at the time that I first presented the matter to him?

"Q. How did the negotiations finally result, Mr. Cobban?

"A. In his saying that Mr. Bickford might look over the titles to the land that I had to offer, and that he would purchase if the titles were satisfactory.

"Q. Now, what, if anything, was said in the course of the conversation had with the defendant, W. A. Clark, in reference to the source from which you had derived title?

"A. I don't think he asked a word about that, and the only thing was that I was to give him a good title, and Mr. Bickford was to examine—or his attorneys were to examine the abstracts of title, and, if found satisfactory, he would make the purchase of the amount that I had. * * *

"Q. Now, what, if anything, did Mr. Clark, or Mr. Wethey or Mr. Bickford know about the facts attendant upon the acquisition of title by you from the entrymen or the facts attendant upon the acquisition of the title by the entrymen in the cases of the timber and stone land, other than what was disclosed by the abstracts, so far as you know?

"A. They had no knowledge other than what was given them by the abstracts, to my knowledge, I don't think they knew anything of it.

"Q. What have you to say as to knowing anything about your having been hired by Mr. Clark to hire these entrymen to take up these lands?

"A. Well, they certainly could not have known anything of the kind.

"Q. Why?

"A. Because there was no such thing existed.

"Q. Now, what was paid you, if anything, by the defendant, Mr. Clark, for the lands mentioned in the deeds before you, of date July 29, 1899, Mr. Cobban?

"A. Just the amount that is stated in the deeds; the actual—it is the amount that was stated in all the deeds, and I think in these deeds of conveyance, the actual amount paid by Mr. Clark is the actual consideration named in the deed—the amounts, in other words, named in the deeds was the actual consideration that he paid me." (Rec. Vol. 10, pp. 5147, 5148, 5149.)

H. W. McLaughlin testifies:

"Q. Now, with reference to the acquiring of title to lands from Mr. Cobban, I want you to state, if you will, Mr. McLaughlin, how it was that the proposition of buying these lands first came to you, was it in the way of Mr. Cobban's making the statement to you that he at that time owned the land?

"A. Certainly; he told me that had this land for sale.

"Q. And was willing to sell them?

"A. He was willing to sell them, wanted to sell them.

"Q. Did you ever at any time, either on behalf of yourself or of any other person, make a contract with him that you would buy from him a certain quantity of land if he got title to it?

"A. No. * * * I went to Cobban and asked him if he had any timber land to sell.

"Q. Now, when the proposition was made to you with reference to the purchase of these lands, did Mr. Cobban at that time give you a list of the land and say he owned these lands?

"A. I said yes, sir, he would bring a description of the land that he had to sell. * * * Then when I got a description of the land I would send the description to be estimated. * * *

"Q. Then when the report was made by the estimator, you would do what?

"A. Well, he would bring the deeds and abstracts of the different bunches of timber that he had for sale, twenty million, thirty million or forty million, whatever it might be, and he would take the list and compare them with the deed and abstract.

"Q. For what purpose did you make comparison with reference to the estimates?

"A. Well, to see that the number of feet was there, that the estimates and the descriptions that was sent to the estimators was in the deed. * * *

"Q. Wasn't the final receipt there to show that final proof had been made?

"A. Yes, sir, the final receipt was with these papers in the case.

"Q. Now, after you had examined and ascertained what the quantity of timber on the land was, what was your next step with reference to the transaction?

"A. After I got through satisfying myself that the estimates and the description of the land were right in the deed, why then they were sent to you to Butte.

"Q. Now, I will ask you to state if, at the time when the papers were sent to me, it is not a fact that the abstract of title, the final receipt, and the deed to Mr. Cobban were also sent at that time?

"A. Every one of them, yes, sir.

"Q. In the majority of cases, I believe, a deed from Mr. Cobban to Mr. Clark was sent along?

"A. Yes, sir.

"Q. Now, up to that time was there ever any contract between Mr. Clark and Mr. Cobban of any nature or description whatever?

"A. Oh, no.

"Q. I will ask you to state if it is not a fact that these contracts with reference to the sale of this particular land mentioned in any particular deed, was not made after the time when the abstract of title had been examined and price agreed upon by Mr. Clark or his agent, Mr. Wethey, and Mr. Cobban?

"A. Yes, sir, that is right.

"Q. I will ask you to state whether, as a matter of fact, Mr. Cobban at any time or under any circumstances acted as the agent or representative of Mr. Clark in any capacity whatever?

"A. He did not; no.

"Q. Was there ever any contract or agreement between Mr. Clark or any agent of Mr. Clark and Mr. Cobban, that Mr. Cobban was to get these men to locate upon these lands for the purpose of ultimately deeding the land to Mr. Clark?

"A. Oh, no.

"Q. Now, I will ask you to state, Mr. McLaughlin, if, as a matter of fact, you had anything yourself to do with any of these entrymen personally with reference to their entries?

"A. I knew nothing at all about the entries, not a thing." (Rec. Vol. 6, pp. 2749, 2752.)

The witness further testifies:

"Q. In figuring upon the basis of a dollar and a quarter a thousand for timber at the time and at the place where this timber was located,

was that a fair and reasonable consideration for the timber?

"A. Yes, sir, I figured it as very reasonable.

"Q. And would be just about what you would consider a fair price for it?

"A. Yes, sir. (Rec. Vol. 6, p. 2755.)

"Q. As a matter of fact, I believe you have already stated that you did not know in what way Mr. Cobban was to get title to this land, whether under the Timber and Stone Act or whether under lieu land selection, or whether under the homestead, or whether under any other law of the United States?

"A. No, I did not." (Rec. Vol. 6, p. 2756.)

This testimony is clear and uncontradicted. It establishes beyond a doubt that the allegations of the bill as to Cobban's agency for the defendant are unfounded in fact; that Clark was a bona fide purchaser for value and without notice of any infirmity whatever in the title. It is further clear that there was no infirmity in the title; that each and every step in the procedure for the acquisition of title had been regularly and properly taken in the United States Land Office; the final receipt duly issued; the patent subsequently issued and delivered; the Government price for the land paid; the proof complete in all its details as required by the rules and regulations of the land office, and that the defendant had taken every precaution which a reasonably prudent business man could take to protect himself in his purchase and to make sure that he was securing a perfect title to the lands.

Griswold, Jemison, Jakways and Faust were not the agents of Cobban. As to Griswold, he has been disposed of, as we apprehend, by his own testimony, which we have already reviewed. Jemison was not the agent of Cobban for the purpose of hiring others to enter lands, but was engaged in finding desirable timber lands himself and deriving a profit therefrom by locating people thereon, not as the agent of Cobban, but for his own personal benefit, as he testifies, and for the personal benefit of Griswold for whom he acted. He states explicitly as follows:

> "And as far as your operations were concerned, you never undertook to make any bargain or contract with anybody by which they were to agree to convey these lands to Mr. Cobban?
>
> "A. No, sir." (Rec. Vol. 1, p. 510.)

He further testifies on pages 511, 512, 513 and 514, that he was instructed by Mr. Cobban positively not to make any bargain with the people for the sale of the claims, and that all of the money advanced by Mr. Cobban was as a loan.

Jakways and Faust both testify that there was no relationship or agency between Cobban and themselves; that Cobban never left any money at their store to be used in paying for entries, and that neither of them was at any time the representative of Cobban, directly or indirectly.

Each and all of the entrymen that testify in the case positively state that they did not enter their

claims for hire, nor upon any agreement or understanding that the said claims were entered for the benefit of any other person than themselves; that there was no agreement or contract of any kind or character whatsoever, and that the money which they obtained when they obtained it from Mr. Cobban was as a loan which they paid back or intended to pay back either upon the sale of their land or in some other manner.

There is no evidence in the record which justifies the conclusion that the timber was estimated before the entry of the land at the land office and the conveyance to Cobban. On the contrary, the testimony of McLaughlin is specific that the lands in question were only examined after the abstracts of title and accompanying documents had been submitted to counsel having their examination in charge, and by him approved. McLaughlin says, and it appears clearly in this record, that W. A. Clark, the defendant, wished to purchase some forty or fifty million feet of timber for use in his mines and smelters; that he went into the market to obtain this timber and that he purchased it from Cobban, who had it for sale. It was a plain and ordinary business transaction—one which would excite no suspicion of irregularity in the mind of any reasonable person. He bought the timber after the title to the land had been approved by his counsel. He paid the purchase price agreed. In order to arrive at that purchase price he was compelled to have an estimate made of the amount of timber standing upon the land. He

was buying the land for the purpose of obtaining the timber. Upon the report of the estimator the transaction was completed, the purchase price paid and the deed delivered. This plain, fair, open business affair has been tortured by counsel into a scheme to defraud the Government of the United States out of its timber.

The witness McLaughlin testifies (Rec. Vol. 6, p. 2752):

> "Q. I will ask you to state whether, as a matter of fact, Mr. Cobban at any time or under any circumstances acted as the agent or representative of Mr. Clark in any capacity whatever?
>
> "A. He did not; no.
>
> "Q. Was there ever any contract or agreement between Mr. Clark or any agent of Mr. Clark and Mr. Cobban, that Mr. Cobban was to get these men to locate upon these lands for the purpose of ultimately deeding the land to Mr. Clark?
>
> "A. Oh, no."

On page 2758 the witness says on redirect examination:

> "Q. Now, as I understand you, as a result of the whole business, you don't know anything about these entrymen and entrywomen that deeded to Cobban?
>
> "A. No, I know nothing at all about it.
>
> "Q. You did not know that they had made entries or were making them?
>
> "A. No.
>
> "Q. Didn't know that such a thing was going on?

"A. No, sir.

"Q. While you were living in Missoula there, during that spring, summer and fall it was not brought to your attention in any way by rumor or otherwise, that there was special interest being taken in making entries under the Stone and Timber Act?

"A. No, sir.

Some reference is made to the Western Lumber Company, a corporation organized under the laws of the State of Washington and doing business in the State of Montana. Mr. Clark, the defendant, is a stockholder in that corporation, together with others. The corporation was engaged in the lumber business. It does not appear that this corporation ever purchased any of the timber lands involved in this suit, nor does it appear that it has been in any way connected with the charges made by the Government in this case. Counsel draws the conclusion that because the defendant Clark was a stockholder in the Western Lumber Company therefore there must have been something unconscionable in the business of that company—an assumption wholly unwarranted by anything in the record.

Some criticism is made as to the testimony of Senator Clark because he made a statement in his direct examination, which he subsequently corrected upon his attention being called thereto. The fact, as appears in the record, is that he had the impression that he met Cobban some time in March. This he subsequently stated was an error, and that he had no distinct recol-

lection of the time when he did meet Cobban with reference to the purchase of timber lands. The argument of counsel is that because Clark made the statement that he met Cobban in March and subsequently stated that he did not know the exact time when he did meet him, therfore Clark entered into a contract with Cobban whereby Cobban was to hire entrymen and entrywomen to take up lands under the Timber and Stone Act for the benefit of Clark. The fact that Clark had known Cobban for a number of years; the fact that Cobban had moved to Butte from Missoula; the fact that Cobban had purchased land from entrymen and entrywomen and had sold it to Clark for cash at an agreed price stated to be the reasonable market value of the land, is not evidence that Clark was acting in bad faith and was attempting to defraud the Government,—in the face of the most positive and unquestioned testimony that there was never any attempt on the part of Cobban to sell the land until he had obtained title thereto, nor any effort on the part of Clark to purchase until the title of Cobban had been clearly established by the records and approved by his counsel.

There is no evidence whatever that Clark had any knowledge of any illegal transactions; there is no evidence whatever that the Western Lumber Company, through any of its officers, had any knowledge of any illegal transactions; there is no evidence whatever that there were any illegal transactions in the taking up of the timber lands in question.

It appears further that the first four deeds were out and out sales; that the subsequent deeds were upon the basis of a loan. We have discussed this matter somewhat, and the facts appear in the record as follows: That Clark only desired to purchase forty or fifty million feet of lumber at the time of the first negotiations; that each transaction was and is a separate and distinct transaction, that is, each deed represented a separate and distinct affair. After the first four deeds had been executed and delivered and the purchase price for the land paid, Cobban desired to sell other lands. He thereupon entered into negotiations with Senator Clark, and it developed that subsequently an arrangement was entered into by which absolute deeds of the lands were made and delivered. They were in fact mortgages to secure a loan made by Clark to Cobban upon a basis of 75 cents per thousand feet of timber standing upon the lands. Subsequently Cobban offered to discount the proposed purchase price of $1.25 per thousand feet of standing timber five per cent; in other words, to take $1.18¾ per thousand feet of standing timber; and this proposition was accepted, and the conveyances became absolute and the title vested in Clark.

This appears clearly from the evidence in the case. Each mortgage deed, constituting a separate and distinct transaction, was accompanied at the time of its execution and delivery by abstracts of title, Receiver's receipts and warranty deeds showing full and complete title to the lands in Cobban. The abstracts and ac-

companying papers were examined by counsel and approved by him, and only after the valid title to the land in question had been passed upon and approved was the loan made. Subsequently the discount offered was sufficient inducement to defendant Clark to take up the option and consummate the purchase. It was a transaction concerning which there could be no question as to its good faith and as to the integrity of those interested therein.

Counsel seeks to argue that because Clark saw fit to loan money to Cobban upon approved real estate security at a rate of interest sufficiently high to warrant the belief that it was a good investment, therefore there must have been some secret understanding between Clark and Cobban by which Clark was the active promoter and backer of Cobban in the alleged illegal entry of the timber lands in question. The assumption is gratuitous, can find no support whatever in the record, and is not true in fact. The claim is made that because Cobban at one time borrowed $10,000 of the bank of W. A. Clark & Brother, a banking house doing business in Butte, in which the defendant Clark was interested, but of the actual transactions of which he had no specific knowledge, therefore he was instrumental in advancing money to Cobban for the purpose of defrauding the Government. And it is argued that because Cobban was borrowing money he could not loan money. The same argument is advanced in regard to Jakways & Faust, merchants at Ovando, that because

they borrowed money they had no right to loan it, and if they did loan money they were evidently doing so for the purpose of defrauding the Government of the United States.

This conclusion does not follow. Every banking house in the United States, perhaps, transacts its business upon borrowed capital. It is doubtful if a merchant exists who is not dependent upon money borrowed to carry on his mercantile business.

The assumption that because Cobban was a borrower he could not be a lender, and because Jakways & Faust were borrowers they could not be lenders, seems gratuitous and unwarranted by the ordinary experiences of mankind. The merchants, Jakways & Faust, as they testify, found that in conducting their business at Ovando they were obliged to aid their customers, ranchmen in that vicinity, with loans of money for the purpose of enabling them to carry on the business of their ranches, as well as to secure from time to time title to land which the ranchmen desired to enter under the laws of the United States.

Cobban himself, according to the testimony of himself and his partner and other witnesses, was engaged in the real estate and loaning business. They loaned money. There is nothing that is more legitimate than for one man to borrow money of another at a given rate of interest and to loan the same money to others at an advanced rate. This is the business of banking, and

upon the increased profit depends the success of financial institutions.

In regard to these loans defendant Clark says in his letter of date October 10, 1899, to Mr. Wethey (Rec. Vol. 9, p. 4406):

> "He (McLaughlin) states as his reason for the advisability of the purchase, that it would compel the Blackfoot people to treat us properly on Nine Mile. It seems to me that we now have enough timber to accomplish that purpose."

And again on page 4407:

> "I certainly would do nothing with the Cobban timber until I have looked into it thoroughly."

On page 4408 defendant Clark says in his letter to Mr. Wethey of date October 11th:

> "It seems to me that as our principal object was to hold the Big Blackfoot Company level as to our operations on the Nine Mile, that we have already sufficient timber for that purpose."

On page 4409, in his letter to Wethey of date October 12, 1899, Clark says:

> "I hardly think it worth while for Cobban to take the trouble to come to Butte, as I will have no time to discuss the matter with him; and, in fact, I have about made up my mind not to purchase any more timber on the Blackfoot. I believe we have enough now to serve our purpose as mentioned. Perhaps it would be better for you to wire him that I cannot consider it, in order to prevent his coming."

On pages 4413 to 4415 we have a letter of Cobban to

Clark of date October 13, 1899, in which he proposes to borrow 75 cents per thousand feet upon certain timber land which he then owned, the loan to be for one year at 10 per cent. per annum, with an option to Clark to take up the option at any time within four months. The acceptance of the loan by Mr. Wethey as the agent of Clark appears on pages 4415 and 4416. On page 4417 is the letter from Clark entertaining the proposition and the basis of it. On page 4418 is another letter from Clark to Wethey of date October 16, 1899, in which he says:

> "I have yours of the 14th inst. relating to Mr. Cobban's proposal for a loan, and note his statement that he has acquired title to 40,000,000 feet of timber on the Blackfoot, which he and his relatives have paid for."

On October 20, 1899, Clark wrote Wethey (Rec. Vol. 9, p. 4419) that he would make the loan upon the security named. On pages 4420 and 4421 is a letter from Clark to Bickford of date November 18, 1899, in which he says:

> "I note that Cobban is now desirious of selling outright the land and timber at a discount of five per cent. I will consider this matter, and probably later wire you."

On page 4427 is the note for $10,000, given by R. M. Cobban to the bank, dated October 31, 1899, as to which Mr. Wethey says:

> "We took up this note from the bank, and that was a part of the second note for $41,538.75."

On page 4429 Clark in a letter of date December 5, 1899, says:

> "I note that Cobban is willing to extend the option and to receive cash less five per cent., for two weeks, which would be about the 15th inst. I am not very particular about it, but I may conclude to take it up."

On December 13, 1899, there is a letter addressed to Wethey (Rec. Vol. 9, p. 4429), which reads as follows:

> "Referring to your valued favor of the 1st inst., concerning the Cobban proposition, I think it would be well to take up the matter, and wire to him accordingly.
>
> "Referring to your letter of the 1st inst., relative to the Cobban proposition, I advise payment to him less five per cent. discount."

On pages 4430-4431 is a letter of Clark to Wethey of date January 22, 1900, in which he says:

> "In any event, as I have stated, I do not desire now to increase my purchase of timber. I do not expect the arrangement with Cobban for advances to go on ad libitum, but I think the amount you stated was sufficient, even if I am secure on my agreement, but I do not care to make any additional contracts of that kind. It is very probable that there will be a chance to buy this timber, should I wish to do so, two or three months hence. However, if he is very anxious about it and sells it to other people and pays off the loan, I shall be satisfied."

On page 4432 appears the agreement of date January 27, 1900, between Cobban and Clark for the loan.

On page 4436 appears the agreement of date November 18, 1899, of Clark with Cobban for the loan and option.

So that it appears from these transactions that Clark loaned to Cobban the money, although he expressly stated that he did not desire to continue the purchase of timber; that the loan was made as a loan, at an agreed rate of interest and for a specific period; that he expressed himself as willing and satisfied if he should receive back the money which had been loaned. The title to the land was examined. It was perfect at the time the loan was made. The title was approved by the counsel of the defendant. Nothing appears anywhere in the record to impugn the good faith of this transaction.

A previous loan had been made by the bank of W. A. Clark & Brother to Cobban for $10,000. That loan was evidenced by a promissory note, which is in the record. This note was paid and incorporated in a new note given by Cobban and secured by a mortgage deed to certain of these lands. That this was a fair and innocent transaction between Cobban and the bank, does not admit of a question.

Cobban borrowed money from the various banks in Missoula and Butte, gave his notes therefor, and eventually paid them up. He also borrowed money from his brothers and from others. That this money was borrowed in good faith, was a legitimate financial trans-

action, is testified to by all of the bankers who were called as witnesses in the case.

The testimony to which we have referred is sufficient, as it seems to us, to establish without further comment the fact that these timber lands were purchased by Clark without any previous notice or knowledge of any defect in the title, and that there was no fact or circumstance in any way tending to put the defendant upon inquiry as to the condition under which the lands had been entered; and we further say, that from the testimony of the land officers, who were witnesses in the case, and of the various entrymen and entrywomen who testified, there is not one single fact or circumstance in this record which in any way tends to show that the fullest and most complete investigation possible by defendant Clark would have given him any right to assume or believe that the entries made by these entrymen and entrywomen had been made contrary to law or subject to attack in any way.

If he had gone to the Register and Receiver of the land office and asked them what, if any, irregularities had taken place in the entries, they would have been compelled to tell him, as they did upon the witness stand when called upon to testify on the part of the Government, that they knew of none. If he had gone to the entrymen and entrywomen and asked them what improper motives had actuated them in entering the lands in question, they would have told him, as they did upon the witness stand, that they knew of none;

that they entertained no illegal purpose; that they had entered the land in good faith, for their own benefit, and not for the benefit of any other person or persons whatsoever; that they had borrowed the money of Cobban to make the entries; that the loan was legitimate; that they had no contract or agreement by which they were to convey the land to Cobban; that they had examined the lands themselves; that the lands were subject to entry under the Timber and Stone Act; and that they had produced their witnesses and made their entries regularly before the land office, and that there was nothing so far as they knew tending in any way to affect or impugn their good faith in the transactions.

The Government of the United States itself had stamped with its approval the regularity of the transactions by which these lands were entered, by issuing its patents therefor and delivering the same to the entrymen or their authorized successors. The deeds which Cobban had were warranty deeds; the deeds which he gave were warranty deeds. The title to the land was correct upon the record, as shown by the abstracts. The approval of his counsel in writing was required and given before the defendant would entertain a proposal for the purchase of the land or for the loan of money upon the lands as security. The loans that were made were made in good faith. The rate of interest that was specified was a reasonable and proper rate. The period of the loan was limited. The option which was given was only taken up upon a discount for cash,

which the vendor, Cobban, proposed to accept, and after that proposal was agreed to by Clark.

Taking these transactions as they appear in the record and applying to them the ordinary rules of business procedure, and recognizing the maxim that all business affairs rest upon the presumption that men act in good faith rather than otherwise, that they are honest rather than dishonest, that they are truthful rather than untruthful,—the conclusion is inevitable that the attempt to impute dishonest motives and wrongful conduct to the defendant here, is without merit and without excuse.

Counsel for the Government have contended that there was a statement of Wethey's found in the record which would lead to the conclusion that the money loaned by Clark to Cobban was advisedly loaned by him for the purpose of buying lands. The question that was asked is set forth as follows:

> "Q. But, as a matter of fact, as it turned out, the defendant's money bought the lands and he obtained title to the lands that he was talking about in this proposition?
>
> "A. The Senator eventually bought the lands, yes, but you want to convey the impression that the money that we paid Cobban at this time was used for buying the lands.
>
> "Q. Yes, that was it. I say that that is a fact.
>
> "A. Yes, and I say that it is not—yes, sir."

Here we have a complete refutation that the money was loaned for the purpose of securing title to the lands

under the Timber and Stone Act. Counsel for the Government attempted to testify in his question and was effectually refuted by the direct testimony of the witness, Wethey, who was then under examination. The particular testimony upon which we are now commenting is found on pages 4559, 4560, 4561 and 4562.

Witness Wethey further testifies on pages 4561 and 4562:

"Q. Do you know under what Act of Congress the additional timber lands that were bought with money that was furnished to Cobban by the defendant, was acquired?

"A. The only timber lands that I knew of being acquired was scrip lands, forest reserve scrip.

"Q. Well, what do you know about that?

"A. Well, I knew that parties were offering us forest reserve scrip, and that Cobban was buying forest reserve scrip. We bought forest reserve scrip for ourselves, and Cobban also said that he had been buying forest reserve scrip.

"Q. And is that all you know about it?

"A. Yes, sir.

"Q. And he said nothing to you about the lands that had been acquired by him under other Acts of Congress?

"A. No, sir.

"Q. Can you give any other reason why he referred to acquiring lands under the scrip lieu act?

"A. Well, I understand that the lands acquired under the scrip lieu act, that he had to pay cash for the scrip before he could use it, and took considerable money."

The witness then goes on, on page 4563, in discussing how he knew that the land purchased by Cobban was scrip land, and is asked this question:

"Q. Well, how do you know that?

"A. Because the land was constantly referred to as scrip land.

"Q. What did you say?

"A. The land was frequently referred to afterwards, and in my letters about that time, as scrip lands, and the other was known to me as deeded lands."

On page 4564, the witness says in defining the difference between the scrip lands and the deeded lands:

"There was this distinction: While we would loan seventy-five cents a thousand on deeded lands, we would only lend fifty cents per thousand on scrip lands; we required a larger margin."

This in connection with the evidence of Wethey that he had no knowledge of any defect or claim of defect in the title; that Senator Clark had no knowledge or means of knowledge; and the clear and unequivocal testimony of all these witnesses that the transaction was a loan made upon good security, effectually disposes of the contention of the Government.

Witness Wethey, on pages 4395 and 4396 of the record, testifies as follows:

"Q. Was there ever, to your knowledge, any contract or agreement between Senator Clark and R. M. Cobban, by the terms of which Cobban was to be charged with the duty of procuring title from the Government of the United States for any land or lands at any time?

"A. No, sir.

"Q. From your conversation with Senator Clark, and from your general knowledge of these transactions, I will ask you to state whether or not it is a fact that these were out and out sales or whether there was any prior agreement with reference to the acquiring of this title in the interest of Senator Clark?

"A. They were out and out sales; he had nothing to do with the acquisition of the property in any way."

Defendant Clark testifies as to his motives as follows on pages 5113 and 5114:

"Q. As a matter of fact, you bought from July, 1899, up to June, 1900, from Mr. Cobban 170,000,000 feet, did you not?

"A. There was no transaction as late as June, 1899, was there?

"Q. That is Mr. Wethey's testimony, amounting in the aggregate to $217,571.25.

"Q. For what different purposes did you want this lumber?

"A. Well, I bought this lumber as I buy anything else because I need it. Because I believed that I might need it. I had contracts with the Big Blackfoot Milling Company which were carried over. I had contracts with the Amalgamated Copper Company. Their contracts were a matter of a few months continuance. The relations between the Amalgamated people and myself at that time were not of the most cordial nature and as I was using large quantities of lumber and timber both for mining purposes and building purposes it was necessary for self protection that I should look out for future supplies and looking forward to the

increase of the lumber business it was very natural that I should desire to secure an ample supply of lumber."

Again on page 2694 the witness McLaughlin testifies:

"Q. Do you know what contract or agreement that Mr. Cobban entered into with Senator Clark, the defendant in this suit, relative to the price he was to receive?

"A. I don't know that there was any contract at all.

"Q. You never saw one?

"A. I never saw one; in fact, I am sure there was no contract."

Then inquiry is made as to the amount that was to be paid for the timber standing. The witness then goes on and says, in reply to questions by counsel, on page 2695:

"Yes, I know that they wrangled quite a while; Mr. Cobban wanted a dollar and a half and Mr. Clark wouldn't pay it, and I think—oh, there was two months or more after the time it was first taken up until an agreement was made about the price."

The testimony of the witness shows that Sparks did not go upon the ground until September or October of that year, long after title to the ground in question had passed from the Government, and long after the final receipts from the land office had been issued to the entrymen and entrywomen, deeds made to Cobban and

the title of Cobban had become perfect, as shown by the abstracts which he submitted to defendant.

It is argued that Senator Clark had negotiated for this timber land in March, 1899. The conversation is found on pages 5116, 5117 and 5118 of the record. Senator Clark, after stating that he had no particular recollection of the conversation, that he had not burdened his mind with it, testifies as follows:

> "Q. Do you know whether when he spoke to you in March, 1899, whether or not he had at that time bought any lands?
>
> "A. That was my understanding that he owned these lands.
>
> "A. Yes, sir; at the time we had the conversation that he owned the lands."

Then further down, on page 5117, appears the following:

> "Q. And you understood that the land was his at the time?
>
> "A. It was my belief that he was selling me something that he possessed. I certainly should not have held any negotiations with him for something he did not own, if I knew it.
>
> "Q. You might have had it in mind that he was securing them?"

And on page 5118:

> "A. I did not have in mind that he was securing these lands, but that he owned them.
>
> "Q. Did you never learn, in any way, as to how he was acquiring title to the lands?

"A. I do not recollect having any information as to how he was securing title to them. My impression was that he had already procured them."

So that it appears from the record clearly that at the time Senator Clark had his conversation with Cobban, Cobban had already secured the title to the lands which he offered for sale.

On redirect examination (Rec. pp. 5127 and 5128) Senator Clark testifies that he left just about the adjournment of the legislature in March, and then proceeds, on page 5148, as follows:

"A. My memorandum book tells exactly when I left Montana and went to Arizona, New Mexico and then I went to New York.

"Q. Do you remember of having any conversation with Mr. Cobban before your departure for New York?

"A. I testified I think that it was in March.

"Q. Did you return to Montana from the time of your leaving in March, 1899, to the month of May?

"A. July 4th is the first letter shown here. It was about that time that I got back.

"Q. What have you to say as to any conversation you had with Mr. Cobban prior to your leaving for New York?

"A. I think I never had any conversation with him prior to that. I think it was in February that I left. I left a long time before the legislature adjourned.

"Q. Then, as I understand the matter, you had a talk about this land before you left for the East?

"A. I will state that in my opinion that I was incorrect in stating that I had a talk with Mr. Cobban in March.

"Q. Then, what have you to say as to your best recollection when you did first talk with him in reference to this matter?

"A. I have no impression about it at all. I do not remember.

"Q. What have you to say with reference to Mr. McLaughlin being employed by you to make any option or agreement for you with reference to the purchase of timber lands.

"A. None whatever. He was never so employed. (Rec. pp. 5127 to 5129.)

We therefore find, upon an examination of the record, that Senator Clark had his conversation with Cobban after Cobban had acquired title to the lands according to his statement. This was not until July, 1899. So that the contention of the Government is in no way borne out by the record.

The testimony of McLaughlin is that he knew nothing of the financial condition of the entrymen and entrywomen, but that he relied upon the deeds and abstracts as showing the title. On record page 2736 the testimony of the witness is as follows:

"Q. If you did not know one of them that had a dollar's worth of property with the exception of George Dildine, how did you understand that they were getting this land?

"A. I say, now, that I did not know whether they had one dollar or five hundred dollars; I did not know what they had.

"Q. You did not know anything?

"A. I did not that, no, sir.

"Q. You have lived in Missoula there for years?

"A. Yes, sir.

"Q. And all the facts and circumstances put together created no suspicion whatever in your mind?

"A. No, sir, not a bit."

Here we have the direct statement of the witness that he had no knowledge, or means of knowledge, and no suspicion, that everything that had been done was not regular and lawful and in full compliance with the rules and requirements for the entry of public lands by the various entrymen and entrywomen that had done so.

This testimony is conclusive upon the point that McLaughlin had no notice or knowledge sufficient to put him on inquiry.

From the testimony of Wethey it is apparent that each and every transaction with Cobban incorporated in the several deeds offered in evidence was a separate and distinct transaction; that there was no knowledge or means of knowledge showing or tending to show in any way that there had been any irregularities in the entries of these lands; that every step was taken to assure the defendant and his manager and counsel that the title was perfect. Mr. Wethey testifies, on page 4389, as follows:

"The deeds were submitted to us with the abstracts; that is, the abstracts had been passed upon and we were advised that the title rested in Mr. Cobban, and Mr. Cobban furnished us with a warranty deed, and I never paid for any of the land until our counsel advised us that it was safe to do so."

On page 4390, referring to the statements made by Mr. McLaughlin, the witness says:

"He said that the land belonged to Mr. Cobban, and the deed shows that."

On page 4391 the question is asked:

"Q. What, if any, knowledge did you have at that time with reference to the manner in which this land had been acquired from the United States?

"A. I had no knowledge whatever."

On page 4491 the witness Wethey testifies as follows:

"I discussed the matter with Senator Clark, and, as I said before, he expressed the opinion that making this second purchase in September, that he had purchased all the timber that he would want, and that he wouldn't take any more. I know he had no arrangement with Mr. Cobban to secure timber for him in any way."

The testimony of Wethey, found on record page 4660, is as follows:

"A. Cobban was acting entirely for himself, and we had no knowledge of what his operations were, but we didn't know that we would buy any more until the question came up, and he presented it to us; and, then, I think the Senator said, in one of his letters, that he didn't think it would be well

to buy any more unless he had some special choice timber to offer, but we were not keeping track of what Cobban was doing. As I said before, he wasn't acting for us in any way in looking for timber; he was simply carrying on a real estate business, and apparently that was one branch of his business, and buying and selling timber and real estate was also part of his business, when he could make a profit at it. We knew he was searching for real estate and was securing it, but he had no knowledge as to who would be the purchaser. He always intimated to me that parties back East were his principals. He had parties in Wisconsin who were anxious to buy timber in that section of the country, and own, I believe several tracts up there now."

A quotation of this testimony is sufficient to show that the witness Wethey constantly and repeatedly stated as a fact that each one of these transactions was a separate transaction; that Cobban was in no sense the agent or employe of Clark, and that the transactions by which the timber was bought by Clark from Cobban were absolute purchases, each transaction being separate and distinct, and that there was no knowledge on the part of Clark of the transactions by which the timtimber land was entered, nor was there any means of knowledge; and that Cobban was acting throughout for himself independently and without any privity whatever between himself and the defendant.

It further appears that, with the exception of one entry, each and every entry in the land office and the issuance of the Receiver's receipt was at a date ~~later~~ earlier than the contract under which the loan was made by

defendant to Cobban, and the title to the land as evidenced by the final receipt had passed to Cobban long prior to the agreement of the defendant to make the loan. Therefore, the money loaned by the defendant could not have been used for the purpose of entering the lands subsequently sold to defendant.

The foregoing quotations and citations, when examined and investigated, are sufficient to establish beyond a doubt that the defendant had no notice, actual or constructive, nor any means or basis upon which notice could be presumed; that Cobban was not his agent in any sense of the word, and that he was absolutely and without question a bona fide purchaser for value, without notice, as claimed in his answer.

We now take up the second branch under this head:

The law relative to the question of notice, as it has been applied by the courts in cases of like character, clearly sustains the position that the defendant did not have notice of the alleged violations of the law in the inception of title to the lands purchased by him.

The defendant in this case had no actual notice of any violations of law whatever, either directly himself or through his agents. There is no evidence whatever, that the defendant Clark was otherwise than an innocent purchaser for a valuable consideration and without notice. The positive testimony of each and every witness, including the defendant himself, is that

he had no notice whatever of any violations of the law; that there was never at any time any suspicion aroused in his mind that the title to the lands conveyed was not perfect and free from any taint whatever. He resorted to every method available to assure himself that the title which he was purchasing was of the kind and character which warranted the expenditure of the large sums of money which he was called upon to pay for the lands. He had the assurance of Cobban, the vendor, that the title to the lands was in him at the time of the negotiations. He referred the matter to his counsel, who examined abstracts of title prepared by a reputable abstract company. He had among the title papers the final receipts issued from the land office; the deeds which accompanied the proposal to sell were warranty deeds; and that each and every step had been taken that was requisite and necessary for the passing of a perfect title, is conclusively established by the subsequent issue by the Government of the United States of a patent to the lands in question. Nothing more could have been asked or required on the part of any one purchasing lands. The officers of the land office each testified that the full requirements of the law had been complied with, and that they had no suspicion of any fraud or perjury in the entries made. Each and every entryman and entrywoman came forward and testified that their entry was made in good faith, for their own benefit, and in compliance with the requirements of the law and the rules and regulations of the Land De-

partment. They had received the final receipts upon which patent subsequently issued. The deeds all contained full covenants of warranty. The abstracts of title established that the record title was in Cobban, the vendor, at the time of the negotiations. The price for which the land was sold was determined by a specific estimate of the amount of the standing timber upon the land. The price agreed to be paid was the full market price for standing timber. The price was paid in cash.

Not one word of testimony from the beginning of this record to the end in any way, directly or indirectly, militates against the truth and accuracy of the statements made by the defendant that he had no notice and no grounds of suspicion affecting the title to these lands.

In the case of United States v. Detroit Timber and Lumber Co., 131 Fed. 674, the Court of Appeals said:

> "There is no evidence in this record that notice of facts sufficient to put a person of ordinary prudence on inquiry for fraud and perjury in the applications for the purchase of these lands was ever given to the Detroit Company or to any of its officers before it consummated its purchase, nor is there any evidence that a reasonably diligent inquiry would have discovered fraud or perjury if it had been instituted. Clark saw the timber contracts and received the assurance of the vendor that all the grantors in them had patents or final receipts for their lands and that the title under them was perfect. These were all the facts relative to this matter of which Clark received notice. The contracts

were such as any entryman might lawfully make under the opinion of the Supreme Court in U. S. v. Budd, 144 U. S. 154. They were not of the same date, but were executed at various times between July, 1899, and September 6, 1900. There was nothing here to incite a reasonably prudent man to inquire for fraud in the entries of the land. Nor would a reasonably diligent inquiry have discovered any fraud. If the question had been put to the entrymen, to the entrywomen, to Martin and to Alexander, they would have answered with a single voice that the statements in the applications were true, for they have so testified here. If inquiry had been made of the officers of the Land Department, they would have replied that there was no falsehood in the statements and that the entries were lawfully and regularly made, for they issued the final receipts and the patents upon them in that belief.

"Nor was there any duty upon this purchaser, in the absence of other facts suggesting inquiry, when the seller presented conveyances to it apparently valid, and gave its assurance that they vested perfect titles in it, to make further investigation. The presumption always is, in the absence of countervailing evidence, that men tell the truth, and that bills of sale and deeds prima facie valid are actually so, and purchasers may lawfully act upon this presumption."

Citing:

Jones v. Simpson, 116 U. S. 609, 615.

In Wilson v. Wall., 73 U. S. 83, on page 91, this court says as follows:

"A chancellor will not be astute to charge a constructive trust upon one who has acted honestly

and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sudgen on Vendors, where he says: 'In Ware v. Lord Egmont the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he *might have acquired,* but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.'

"The application of these principles of equity to the present case is too apparent to need further remark."

See also, Ware v. Lord Egmont, 4 D. M. & G. 460, 473.

Sudgen on Vendors, 722.

In the case of Meehan v. Williams, 48 Pa. St., 238, on page 241, the court says:

"What makes inquiry a duty, is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell."

The language of the Supreme Court of Pennsylvania in the case of Meehan v. Williams, supra, was quoted with approval by the court in Townsend v. Little, 109

U. S. 511, and in Crawford v. Neal, 144 U. S. 585, the court says, with reference to the burden of proof in cases of fraudulent transfer:

> "The burden of proof is upon the attacking creditor, but where the fraudulent intent on the grantor's part is made out and the circumstances are suspicious, the purchaser must show that he has paid value, and if he does, it must then appear that the purchaser had notice of the fraud."

Counsel for appellant recognize that in order to maintain their contention under the decisions of the Supreme Court in the Maxwell Land Grant Case, 121 U. S. 378, the frauds charged must be sustained by evidence of the highest and most satisfactory character, amounting in effect to establishing the facts beyond a reasonable doubt. The decision in that case is, of course, controlling, and the rule there laid down, "that to annul such an instrument and destroy the title claimed under it, the facts on which the action is asked for must be clearly established by evidence entirely satisfactory to the court," is the rule that must govern in this case.

An examination of the decisions of the Supreme Court upon this matter leaves no doubt as to the fact that the burden of proof rests upon the Government to show, not only the fraud charged, by the most satisfactory and convincing proof, but also that the defendant had notice of the alleged frauds which would put him on inquiry and lead to his discovery of such frauds, if any.

In the case of Colorado Coal Company v. United

States, 123 U. S. 307, on pages 317 and 318, the court says as follows:

> "It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the Government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish. It is, indeed, sometimes said that a negative is incapable of proof, but this is not a maxim of the law. In the language of an eminent text writer: 'When the negative ceases to be a simple one—when it is qualified by time, place or circumstance—much of this objection is removed; and proof of a negative may very reasonably be required when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative.' Best on the Law of Evidence, Am. ed. Boston, 1883, sec. 270. So also Ibid. sec. 273: 'When a presumption is in favor of the party who asserts the negative it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative.'"

And again, on page 319, the court says:

> "Mr. Greenleaf states the rule in equivalent terms. He says, 1 Greenleaf on Evidence, sec. 78: 'To this general rule, that the burden of proof is

on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff *grounds his right of action upon a negative allegation*, and where, of course, this negative is an essential element in his case.' And in sec. 80: 'So, where the negative allegation involves a charge of *criminal neglect of duty*, whether official or otherwise; or fraud; or the wrongful violation of actual lawful possession of property; the party making the allegation must prove it, for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged.'"

In the case of United States v. San Jacinto Tin Co., 125 U. S., 273, on page 300, the court, after referring to the Maxwell Land Grant Case, and the rule therein laid down, says as follows:

"So far from there being the satisfactory evidence here pointed out of a fraud against the Government having been perpetrated in this case, there is really little but suspicion, fierce denunciation, and a bitter use of such words as 'fraud,' 'deceit' and 'imposition.' If the case stood alone upon the testimony introduced by the Government it would, so far as any fraudulent purpose is concerned do but little more than raise a suspicion that the parties engaged in the transaction sought their own interest at the expense of the Government, and not always by the most appropriate means; but when the testimony for the defense is considered it refutes, not only the existence of any such fraudulent intent or dishonest acts, but it removes from the main actors in the matter even the suspicion

of having used underhand and improper means for the accomplishment of their purposes."

In the case of United States v. Des Moines, etc., Co., 142 U. S. 510, on page 541, the court says:

> "Even if this be regarded as a bill brought by the United States simply to protect its own interests, and recover its own property, still it is well settled that where relief can be granted only by setting aside a grant, a patent or other evidence of title, issued by the Government, in the orderly administration of the affairs of the Land Department, the evidence in support must be clear, strong and satisfactory. Muniments of title issued by the Government are not to be lightly destroyed."

In the case of United States v. Bell Telephone Co., 167 U. S. 224, the same principle is recognized and reiterated.

In the case of United States v. Marshall Mining Co., 129 U. S. 579, on page 589, the court says as follows:

> "The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issue, nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent is procured."

In the case of United States v. Iron Silver Min. Co., 128 U. S. 673, on page 676, the court says as follows:

> "In this respect, the United States, as a landed proprietor, stand upon the same footing with the private citizen. The burden of proof in such cases

> is upon the Government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the Government charged with the alienation of public lands, can only be overcome by clear and convincing proof."

It is doubtful whether in this case there is such an allegation of fact in the bill as would warrant the court in an investigation of the question of whether the defendant Clark was a purchaser with notice. Upon this subject, in the case of United States v. Throckmorton, 98 U. S. 61, on page 64, the court says:

> "It is true that the defendants are charged in general terms with being purchasers with notice.
>
> "It is true that the United States is not bound by the Statute of Limitations, as an individual would be. And we have not recited any of the foregoing matters found in the bill as sufficient of itself to prevent relief in a case otherwise properly cognizable in equity. But we think these are good reasons why a bill which seeks under these circumstances to annul a decree thus surrounded by every presumption which should give it support, shall present on its face a clear and unquestionable ground on which the jurisdiction it invokes can rest."

The allegations in the bill here being not that there was a specific notice of any illegal acts, but merely that the defendant had notice "in a general way," it is doubtful, in the absence of any specific allegation of fact, whether this, under the foregoing authorities, would be sufficient; but, whether the allegation is suffi-

cient or not, the proof is clear that no notice of any character was had by the defendant, and that his acts were entirely bona fide and without notice, in his acquisition of title.

In the opinion filed in the Circuit Court of Appeals, in this case, it is said:

> "But it is also claimed on the part of the Government that the appellee was not an innocent purchaser of the equitable title, but, on the contrary, knew or had good reason to know, at the time of his respective purchases, of the alleged frauds on the part of Cobban, Griswold, Catlin, and the respective entrymen and entrywomen. On this point the allegations of the bill are: 'And your orator charges that the said defendant William A. Clark, well knew in a general way if not in detail, at the time the said conveyances of all of said lands were made to him by said Cobban, the facts hereinbefore stated, and well knew and had good cause to know that the said lands had been entered in violation of the laws of Congress under which said entries were made; and that the several parties had entered the same for hire and upon speculation and for the purpose of enabling him, the said defendant, to procure title to the same by evasion and violation of said laws of Congress.'
>
> "In the opening brief of counsel for the appellent this contention is not very strongly urged, but in their brief filed in reply to that of the appellee it is much insisted on; and it is there in effect claimed that the appellee was in fact a party to those alleged frauds.
>
> "We are of the opinion that the evidence does not sustain either of those contentions. In the first place, if the appellee had been willing to be-

come a party, with Cobban and the others named, to the alleged frauds upon the Government, or if Cobban had been acting as the agent of the appellee, as is alleged in the bill, it is passing strange that the appellee should have paid Cobban $217,571.25 for the timber and lands in question, as the counsel for the Government admit that he did. Cobban, it is claimed, paid only the Government price of $2.50 an acre for the lands, $100.00 to each of the entrymen and entrywomen, and the incidental fees and expenses, and it is incredible that a man of brains and of large business affairs, as the record shows the appellee to be, would, if Cobban had been his agent, or if the appellee had been dishonest enough to have joined Cobban in the alleged fraudulent scheme to obtain lands from the Government in violation of its laws, have paid him $217,571.25 for what Cobban, in pursuance of the same undertaking, paid but a mere trifle in comparison. It is, we think, incredible that the appellee would have permitted his partner in the fraud to profit so largely at his expense if he had been a party to it.

"The evidence, in our opinion, fails to justify the contention of appellant's counsel that Cobban was at any time acting for the appellee, or that the latter was in any way a party to the alleged frauds, or ever heard anything of them until after he had made his purchases and paid his money.

"It shows that the appellee was a man of large business affairs, engaged in extensive mining operations, requiring large quantities of timber, and also engaged in the lumber business on a large scale. He needed timber lands, or, at least, the timber growing upon them. Cobban claimed to own such timber and timber lands. The case shows that the appellee's operations were so extensive that it was necessary for him to operate largely

through agents. A man named Wethey was his general manager, and one McLaughlin his timber agent. In their reply brief counsel for the Government contended that the appellee commenced negotiating for the lands in question before he made his purchases. We do not think that the fair conclusion to be drawn from the evidence. It seems that the appellee first authorized Wethey to buy forty million feet of lumber. Cobban representing that he owned lands containing the required timber, persons were sent by the respective parties to examine the lands and estimate the number of feet of lumber each tract contained. The price to be paid for the land was, according to the agreement between Cobban and the appellee, to be an amount equal to $1.25 for each thousand feet of lumber the land contained; and the method adopted by the parties was that when the respective estimates were made, they were submitted to McLaughlin, who, when satisfied of the amount and quality of the timber, would submit an abstract of title to the lands, together with a deed from Cobban, to Mr. Bickford, the attorney of the appellee, and upon a favorable report in respect to the title by the attorney, the money was paid over by Wethey, the general manager of the appellee, and the deed to the latter from Cobban delivered. The first two of such deeds were so delivered July 19, 1899, and the next two September 16, 1899. These, according to the evidence, were the only absolute sales, from their inception, by Cobban to the appellee. But subsequently Cobban and the appellee, through his agents, commenced negotiations for additional lumber and timber lands. Cobban wanted the appellee to loan him money, bearing interest, with which to carry on his operations and to acquire additional lands,

and to take as security his (Cobban's) deeds covering the lands, the amount of such advances to be at the rate of 50 cents for every thousand feet of lumber on lands acquired by Cobban under scrip locations, and 75 cents a thousand feet for every thousand feet of lumber on other lands, subject to like examination as to the quantity and quality of the timber by the appellee's agents, and to like approval of Cobban's title by the appellee's attorney. That arrangement was agreed to by Cobban and the appellee, and the first of those transactions was consummated November 11, 1899, the next November 13 of the same year, the next two January 9, 1900, the next June 15, 1900, and the last June 16, 1900. Subsequently, by agreement of the respective parties, these mortgages were, for a money consideration, converted into absolute sales. While it is true that the record shows that the appellee knew that some of the money he loaned Cobban was intended to be used by him in acquiring additional lands, it does not show that the appellee knew or had any reason to know that he expected to acquire them fraudulently or in any way unlawfully. United States patents cannot be annulled upon mere suspicion of fraud, even if it could be properly held that any such suspicion arises upon this record against the appellee."

And further, in the opinion in this case, it is said:

"The testimony of the appellee is positive and clear that he knew nothing of the circumstances attending the entries of the various tracts of land in question by the respective entrymen and entrywomen or the conveyances from them to Cobban, and that he never suspected that they were obtained by any fraudulent, unlawful, or irregular means, but that, on the contrary, he bought and paid for them in good faith, relying upon the ad-

vice of his attorney in respect to the regularity of the proceedings and the validity of the title, and upon his agents as to the quality and quantity of lumber they contained. In these respects the appellee's testimony is corroborated by that of his attorney, general manager, and timber agent. It may be added that the officers of the land office where the entries in question were made testified that they knew of no fraud or irregularities in connection with them, and the entrymen and entrywomen who were examined as witnesses in this case testified to the effect that they had not made any agreement with any person or persons by which the title that they might acquire from the Government would inure to the benefit of any other person, nor did they seek to buy the land applied for on speculation, but for their own individual use and benefit. However that may be—a question, as has been said, not necessary to be here determined—we think that the evidence in the present record falls far short of establishing that the appellee knew or had reason to know of any such frauds at the time of his respective purchases." (Rec. Vol. of Pro. in U. S. Cir. Ct. of Apps., pp. 8-10, inclusive.)

In the opinion of Judge Knowles rendered in this case, in the Circuit Court, he says:

"If the doctrine contended for by counsel for the Government in this case should prevail, no purchaser of a title to Government land which has a foundation in a deed executed before patent issued, would be secure, and the insecurity pointed out, that would arise in the cases where it is sought to set aside and cancel patents against bona fide purchasers for alleged fraud on the part of the entrymen would be ever present and could not be eliminated for the reason that the statute of limitations

does not run against the Government. But let it be considered that the defendant Clark was bound to take notice of the different steps taken by the entrymen in obtaining these patents. What would he be required to take notice of? The records of the land office appear to have been in due form and correct; they were such as induced the Land Department to issue the proper patents to the entrymen and entrywomen. I do not think he could be required to be more astute than the land officers themselves; but suppose he had gone further and made inquiry of the various persons who made the entries and secured the final certificates of purchase from the proper officers of the Land Department, and upon inquiry had been told the same facts as were sworn to in the affidavits of these parties at the time when they made their final proofs and payment, and the same as was testified to at the hearing before the Special Examiner in this case? But it cannot be conceded that there is any evidence that shows that Clark was put upon his inquiry as to the sources of his title.

"There is absolutely no proof showing or tending to show, that Clark had any actual knowledge of the frauds alleged to have been committed by the entrymen and women. The evidence shows conclusively that Cobban was not the agent of Clark in the purchase of these lands. Cobban was the vendor."

In this connection, the principle enunciated in the discussion last before this, that the patent of the United States would not be set aside unless the evidence was clear and conclusive upon the allegations of fraud, applies with even greater force in the case where the rights of a bona fide purchaser for value are involved. The allegation of the bill, that admitting the fact that the

defendant was a bona fide purchaser, that he paid value for the land, still that he must have had notice or is presumed to have had notice of the illegal character of the entries, must be established, under the authorities, by testimony of the most conclusive character. The rights of a bona fide purchaser cannot and will not be disturbed unless the testimony is conclusive of the facts alleged. There must be no question as to the conclusive character of the proof. He is favored in equity. His rights are to be protected at all hazards. A forfeiture of those rights can only be decreed when there is no other course left by reason of the conclusive character of the proof adduced in support of the claim of the Government.

Lewis v. Shaw, 57 Fed. 516;

U. S. v. Meeker, 50 Fed. 146;

Johnson v. Towsley, 13 Wall. 72.

We therefore submit that the defendant Clark in this case, holds a perfect and indefeasible title to the lands in question under a patent of the United States. That this patent relates back to the date of the inception of proceedings taken by the entrymen in the land office; that the Land Department has no right to question the title issued under its authority to the entrymen; that every presumption of law is that all of the necessary and requisite proceedings had been complied with; that the Land Department had jurisdiction over the subject-matter; that the entrymen had the requisite qualifica-

tions; they fulfilled the requirements of the law and of the rules and regulations of the Land Department in making the entry, and that the branch of the Government having jurisdiction of this matter had decided that it was satisfied that all the requirements had been fulfilled, and that the patent was the proper fulfillment of the obligation of the Government to the entrymen. That when patent issued, it conveyed all of the title which the Government had, perfect and indefeasible, and that the defendant under the warranty deeds received by him received the patent, and his title became as perfect as if that patent had been issued upon the date the final receipt was issued from the land office. It further appears, without contradiction, that the defendant Clark purchased in good faith; that he paid the full purchase price for the land, and the full value of the land in cash. That he had no notice or means of notice that anything illegal had entered into the procuring of the title to the lands. That there was nothing to excite his suspicion, but on the contrary that each and every act requisite had been fulfilled and complied with on the part of the entrymen and the officers of the Government, and that he was advised by counsel that his title was perfect,—bringing himself strictly within the rule laid down by the Supreme Court of the United States in the Budd case.

We therefore submit that there is no merit in the contention of counsel for the Government that he only purchased an equitable interest. All of the authorities

cited heretofore in this brief establish clearly that he purchased the equitable interest which was subsequently perfected into an absolute legal title by the patent of the United States. That he is a bona fide purchaser for value and without notice; that he is entitled to the protection of the law as specified in the act of Congress, and that to deny him that right would be to repeal the act.

In conclusion, we respectfully submit that there is an absolute lack of proof to sustain the allegations of fraud, the evidence being entirely contrary to the contentions of the Government, and there being no testimony whatever to sustain any of the issues presented by the bill.

And lastly, we submit that the defendant Clark is shown to have been a bona fide purchaser for value and without notice; that he has made his defense upon this ground, established it by uncontradicted testimony, and that for these reasons the decrees of the Circuit Court and the Circuit Court of Appeals were right and should in all respects be affirmed.

Respectfully submitted,

W. M. BICKFORD,
GEORGE F. SHELTON,
Counsel for Appellee.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 359.

Office Supreme Court U. S.
FILED
JAN 4 1906
JAMES H. McKENNEY,
Clerk.

THE UNITED STATES, APPELLANT,

vs.

WILLIAM A. CLARK, APPELLEE.

ADDITION TO BRIEF FOR APPELLEE.

Since the printing of the brief in the above-mentioned case our attention has been called to an error in the record as printed and here presented to the court for consideration. In order to correct the record to correspond to the true statement of facts and to give the testimony properly as it was given before the circuit court of the United States, ninth circuit, district of Montana, we respectfully call the attention of the court to page 510 of volume 1 of testimony of the transcript of record on appeal to the Supreme Court, and we respectfully submit that the record at said page is not correctly printed in this respect.

The question was propounded to witness Albert Jamison:

> Q. "Now, what instructions did Mr. Cobban give "you when you went to work for him locating people "on lands as you say?" Ans. "Well, at that time, "after I commenced there for him he gave me the "same instructions that I spoke of yesterday after- "noon. He told me not to make any—I just forget "now the way, but what I taken him to mean was

"not to make any bargains with the people, that the "money was to be considered as a loan to these "people."

In the printed record as filed in this court, in the answer of the witness Jamison, the word "not" has been incorrectly inserted before the word "to" in the last line of said answer as printed on said page 510, being the tenth line on said page. The incorrect insertion of the word "not" in the printed record has entirely changed the meaning of the testimony of the witness, so far as this particular fact is concerned.

In support of our statements with reference to the record we have secured from the clerk of the United States court, ninth circuit, district of Montana, a certificate, which we have filed with the clerk of this court, and ask to have the same made a part of the record in this case. A copy of the certificate mentioned is hereto attached.

Respectfully submitted.

GEORGE F. SHELTON,
WALTER M. BICKFORD,
Counsel for Appellee.

CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

THE UNITED STATES OF AMERICA, *Plaintiff*,
vs.
WILLIAM A. CLARK, *Defendant*. } Cause No. 157.

U. S. OF AMERICA,
District of Montana, } *ss*:

I, George W. Sproule, clerk of the United States circuit court, ninth circuit, district of Montana, do hereby certify that in the original transcript of the testimony taken in said

cause, on file and of record in my office, in the cross-examination of Albert Jamison, a witness for complainant, on page 488, volume 1, of said testimony, in answer to the following question: "Q. Now, what instructions did Mr. Cobban give you when you went to work for him locating people on lands as you say?" Ans. "Well, at that time, after I commenced there for him, he give me the same instructions that I spoke of yesterday afternoon. He told me not to make any—I just forget now the way, but what I taken him to mean was not to make any bargains with the people, that the money was to be considered as a loan to these people."

And I further certify that I have examined the printed record on appeal in said cause to U. S. Supreme Court, and that the answer as appearing on page 510, vol. 1, of said transcript of record on appeal to the Supreme Court of the United States, purporting to be a copy of answer to question, as above recited, is incorrectly printed by having inserted therein the word "NOT" before the word "*to*" on last line of said answer as printed.

Attest my hand and the seal of said court, at Butte, Montana, this 12th day of December, A. D. 1905.

[SEAL.] GEO. W. SPROULE, *Clerk.*

[Endorsed:] No. 359, October term, 1905. United States *vs.* W. A. Clark. Certificate of clerk of U. S. circuit court.

[Endorsed:] File No. 19,861. Supreme Court U. S., October term, 1905. Term No. 359. The United States, app't, *vs.* Wm. A. Clark. Certificate of clerk of U. S. circuit court for district of Montana as to error in record. Filed Dec. 28, 1905.